

6-11-2010

Suhadolnik v. Pressman Clerk's Record Dckt. 37526

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LAW CLERK

Vol 1 of 2

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

FRANZ SUHADOLNIK and
BETTY SUHADOLNIK, individually and as
husband and wife,

PLAINTIFFS-APPELLANTS,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a limited liability company,
THE EYE ASSOCIATES, P.A., an Idaho
corporation, and BUSINESS ENTITIES I through
X, and JOHN DOE and JANE DOE, husband and
wife, I through X,

DEFENDANTS-RESPONDENTS.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

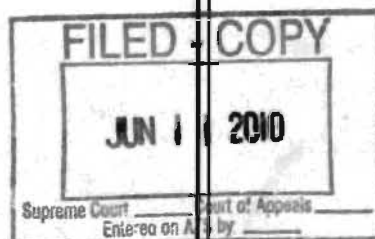
Hon PATRICK H. OWEN, District Judge

JAROM A. WHITEHEAD

Attorney for Appellant

TERRENCE S. JONES

Attorney for Respondent



COPY

37526

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as husband
and wife,

Plaintiffs-Appellants,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a limited liability
company, THE EYE ASSOCIATES, P.A., an
Idaho corporation, and BUSINESS ENTITIES
I through X, and JOHN DOE and JANE DOE,
husband and wife, I through X,

Defendants-Respondents.

Supreme Court Case No. 37526

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE PATRICK H. OWEN

JAROM A. WHITEHEAD

ATTORNEY FOR APPELLANTS

TWIN FALLS, IDAHO

TERRENCE S. JONES

ATTORNEY FOR RESPONDENTS

BOISE, IDAHO

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REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION FOR SUMMARY
JUDGMENT, FILED JANUARY 5, 2010168

Date: 5/5/2010

Time: 03:52 PM

Page 1 of 2

10th Judicial District Court - Ada County

User: CCLUNDMJ

ROA Report

Case: CV-PI-2008-08249 Current Judge: Patrick H. Owen

Franz Suhadolnik, etal. vs. Scott H Pressman MD, etal.

Franz Suhadolnik, Betty Suhadolnik vs. Scott H Pressman MD, The Eye Associates P A

Date	Code	User		Judge
5/2/2008	NCPI	CCDWONCP	New Case Filed - Personal Injury	Patrick H. Owen
	COMP	CCDWONCP	Complaint Filed	Patrick H. Owen
	SMFI	CCDWONCP	Summons Filed	Patrick H. Owen
10/30/2008	AFOS	MCBIEHKJ	(2)Affidavit Of Service 10/23/08	Patrick H. Owen
	AFOS	MCBIEHKJ	Affidavit Of Service 10/21/08	Patrick H. Owen
11/24/2008	ANSW	CCGARDAL	Answer and Demand for Jury Trial (Jones for Scott H Pressman, the Eye Associates)	Patrick H. Owen
11/26/2008	NOTS	CCTOWNRD	Notice Of Service	Patrick H. Owen
12/3/2008	HRSC	DCOATMAD	Notice of Scheduling Conference -- Hearing Scheduled (Scheduling Conference 01/22/2009 03:45 PM)	Patrick H. Owen
1/22/2009	HRVC	CCHUNTAM	Hearing result for Scheduling Conference held on 01/22/2009 03:45 PM: Hearing Vacated	Patrick H. Owen
2/11/2009	HRSC	DCTYLENI	Hearing Scheduled (Scheduling Conference 02/25/2009 03:30 PM) telephonically	Patrick H. Owen
	NOTC	DCTYLENI	Second Notice of Scheduling Conference (2/25/09 @ 3:30 p.m.)	Patrick H. Owen
3/6/2009	HRHD	CCHUNTAM	Hearing result for Scheduling Conference held on 02/25/2009 03:30 PM: Hearing Held telephonically	Patrick H. Owen
3/17/2009	HRSC	CCHUNTAM	Hearing Scheduled (Jury Trial 06/14/2010 09:00 AM)	Patrick H. Owen
	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 05/25/2010 03:00 PM)	Patrick H. Owen
	HRSC	CCHUNTAM	Hearing Scheduled (Status by Phone 05/06/2010 03:00 PM)	Patrick H. Owen
3/19/2009	MODQ	CCNELSRF	Motion To Disqualify	Patrick H. Owen
3/23/2009	ORDR	DCJOHNSI	Order to Disqualify-Hurlbutt	Patrick H. Owen
4/2/2009	NOTS	CCLYKEAL	Notice Of Service	Patrick H. Owen
4/8/2009	NOTS	MCBIEHKJ	Notice Of Service	Patrick H. Owen
5/5/2009	NOTS	CCBURGBL	(2) Notice Of Service	Patrick H. Owen
9/11/2009	NODT	CCSIMMSM	Notice Of Taking Deposition Duces Tecum of Defendant Scott H. Pressman, M.D.	Patrick H. Owen
10/8/2009	NOTC	CCHOLMEE	Notice of Taking Deposition Duces Tecum of Plaintiff Betty Suhadolnik	Patrick H. Owen
	NOTC	CCHOLMEE	Notice of Taking Deposition Duces Tecum of Plaintiff Franz Suhadolnik	Patrick H. Owen
10/13/2009	NOTS	MCBIEHKJ	Notice Of Service	Patrick H. Owen
11/6/2009	NOTC	CCWRIGRM	Notice of Firm Name Change	Patrick H. Owen
11/13/2009	MOSJ	CCAMESLC	Motion For Summary Judgment	Patrick H. Owen
	AFSM	CCAMESLC	Affidavit In Support Of Motion for Summary Judgment	Patrick H. Owen

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Date: 5/5/2010

Time: 03:52 PM

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10th Judicial District Court - Ada County

User: CCLUNDMJ

ROA Report

Case: CV-PI-2008-08249 Current Judge: Patrick H. Owen

Franz Suhadolnik, etal. vs. Scott H Pressman MD, etal.

Franz Suhadolnik, Betty Suhadolnik vs. Scott H Pressman MD, The Eye Associates P A

Date	Code	User	Judge
11/13/2009	AFFD	CCAMESLC	Affidavit of Scott H Pressman Md
	MEMO	CCAMESLC	Memorandum in Support of Motion for Summary Judgment
11/16/2009	HRSC	CCAMESLC	Notice of Hearing (Motion for Summary Judgment 12/22/2009 03:30 PM)
12/8/2009	AMEN	CCWRIGRM	Amended Notice of Hearing (01/12/10 @ 3:30pm)
	HRSC	CCWRIGRM	Hearing Scheduled (Hearing Scheduled 01/12/2010 03:30 PM) Motion for Summary Judgment
12/15/2009	WITN	CCTOWNRD	Plaintiffs Disclosure of Expert Witnesses
12/22/2009	HRVC	CCHUNTAM	Hearing result for Motion for Summary Judgment held on 12/22/2009 03:30 PM: Hearing Vacated
12/24/2009	MISC	CCRANDJD	Plaintiffs Supplemental Disclosure of Expert Witnesses
12/29/2009	MEMO	CCWRIGRM	Plaintiffs Memorandum in Opposition to Defendants Motion for Summary Judgment
	AFFD	CCWRIGRM	Affidavit of Counsel in Support of Memorandum
1/5/2010	RPLY	CCBOYIDR	Reply Memorandum in Support of Motion for Summary Judgment
1/12/2010	DCHH	CCHUNTAM	Hearing result for Hearing Scheduled held on 01/12/2010 03:30 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
2/1/2010	STIP	CCDWONCP	Stipulation to Vacate and Continue Trial
2/18/2010	DEOP	DCLYKEMA	Memorandum Decision and Order
	CDIS	DCLYKEMA	Civil Disposition entered for: Pressman, Scott H MD, Defendant; The Eye Associates P A,, Defendant; Suhadolnik, Betty, Plaintiff; Suhadolnik, Franz, Plaintiff. Filing date: 2/18/2010
	HRVC	CCHUNTAM	Hearing result for Status by Phone held on 05/06/2010 03:00 PM: Hearing Vacated
	HRVC	CCHUNTAM	Hearing result for Pretrial Conference held on 05/25/2010 03:00 PM: Hearing Vacated
	HRVC	CCHUNTAM	Hearing result for Jury Trial held on 06/14/2010 09:00 AM: Hearing Vacated
	STAT	CCHUNTAM	STATUS CHANGED: closed
3/18/2010	JDMT	CCHUNTAM	Judgment
3/22/2010	APSC	CCTHIEBJ	Appealed To The Supreme Court

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RECEIVED

MAY 24 2008

Ada County Clerk

PEDERSEN and WHITEHEAD
Attorneys at Law
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, ID 83303-2349
208/734-2552

Attorney for:

Plaintiffs

NO. _____ FILED _____
A.M. _____ P.M. *3:40*

MAY 02 2008

J. DAVID NAVARRO, Clerk
By PATRICIA A. DWONCH
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., THE EYE
ASSOCIATES, P.A., an Idaho
Corporation, and BUSINESS ENTITIES I
through X, and JOHN DOE and JANE
DOE, husband and wife, I through X,

Defendants.

Case No. **OV PI 0808249**

**COMPLAINT AND DEMAND FOR
JURY TRIAL**

Plaintiffs complain and alleges as follows:

PARTIES

1. At all times material hereto Plaintiffs resided in the City of Sun Valley, County of Blaine, Idaho.
2. At all times material hereto Defendant Scott H. Pressman, M.D., has been and now

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is a physician holding himself out as duly licensed to practice his profession under and by virtue of the laws of the State of Idaho and was, and now is, engaged in the practice of his profession in the City of Boise, County of Ada, Idaho.

3. At all times material hereto Defendant The Eye Associates, P.A. was a public entity or corporation, organized and existing under the laws of the State of Idaho, with its principal place of business situated in and doing business in the City of Boise, County of Ada, Idaho.

4. The true names and capacities of Defendants John Doe and Jane Doe, husband and wife, I through X, and Defendants, Business Entities I through X, are individuals, whose true names and identities are unknown to Plaintiff, but who are or may be liable to Plaintiff based upon the events and occurrences alleged herein. These parties are joined as defendants under the fictitious names indicated pursuant to Idaho Rule of Civil Procedure 10(a)(4), and at such time as their true names, identities and involvement are discovered by Plaintiff, leave will be sought to amend this Complaint to allege their true names, identities and involvement.

5. The professional and business relationships of Defendants to one another are not known to Plaintiff at this time.

FACTUAL CONTENT

6. At all times relevant hereto, Mr. Suhadolnik had been prescribed and was taking the drug Flomax to alleviate problems associated with prostate enlargement. A known side effect of taking the drug is softening of the tissues in the retina area of the eye.

7. Mr. Suhadolnik also had cataracts and on May 31, 2006, he underwent cataract surgery under the care of and performed by Dr. Scott Pressman.

8. Cataract surgery such as Dr. Pressman performed is contraindicated for persons taking Flomax such as Mr. Suhadolnik.

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9. As a result of the surgery Mr. Suhadolnik suffered injury to his vision.

10. On February 27, 2007, Franz Suhadolnik had corrective surgery performed by Dr. Michael Teske of the Moran Eye Center in Salt Lake City, Utah.

11. Following the corrective surgery performed by Dr. Teske, Franz Suhadolnik's vision improved, however, he is still legally blind in the affected eye. Mr. Suhadolnik is expected to need additional surgeries to repair damage to the eye which resulted from the cataract surgery performed by Dr. Pressman.

COUNT ONE

12. Plaintiffs reallege the allegations contained in paragraphs 1 through 11 herein.

13. Defendants, their agents, servants and/or employees were jointly and severally negligent, grossly negligent and/or reckless in the manner in which they provided and/or failed to provide information and services to Plaintiff Franz Suhadolnik; such acts were substantial contributing factors in causing Plaintiff to suffer injury and damages.

14. As a result of Defendants' acts Plaintiffs have suffered and are entitled to an award of damages, both special and general, in excess of \$10,000, and in an amount to be proven at trial.

COUNT TWO

15. Plaintiffs reallege the allegations contained in paragraphs 1 through 14 herein.

16. Defendants', their agents, servants, and/or employees actions described previously violated Idaho Code § 39-4501 through § 39-4507.

17. Such actions constitute lack of informed consent which is negligence. Such negligence proximately caused Plaintiffs to suffer damages.

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18. Plaintiffs are entitled to an award of damages, both special and general, in excess of \$10,000, and in an amount to be proven at trial.

COUNT THREE

19. Plaintiffs reallege the allegations contained in paragraphs 1 through 18 herein.

20. It has been necessary for Plaintiffs to hire the firm Pedersen and Whitehead to prosecute this action.

21. Plaintiffs are entitled to reasonable attorney fees in the event they are the prevailing party in this action, pursuant to Idaho Code § 12-121 and the applicable rules of the Idaho Rules of Civil Procedure.

DAMAGES

22. As a proximate and/or producing result of Defendants' negligence, gross negligence, intentional acts and/or recklessness, Plaintiffs have suffered substantial injuries and damages.

23. There may be other factors affecting Plaintiffs' damages. However, the negligence, gross negligence, intentional acts and/or recklessness of Defendants were substantial factors in causing the damages.

24. There are certain elements of damages provided by law that Plaintiffs are entitled to have the jury in this case separately consider in determining the sum of money that will fairly and reasonably compensate Plaintiffs for their injuries and damages. Those elements of damage include, but are not limited to, the following, both up to the time of trial and beyond:

- A. Medical expenses necessarily incurred and to be incurred in the treatment of Plaintiff Franz Suhadolnik;
- B. Travel expenses necessarily incurred and to be incurred in securing treatment for Plaintiff Franz Suhadolnik;

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- C. The reasonable amount necessary to reimburse Plaintiffs for time spent on additional tasks necessitated by this injury such as traveling to healthcare providers and other tasks related to recovery;
- D. Expenses necessarily incurred and to be incurred because of Plaintiff Franz Suhadolnik's permanent physical impairment and his resulting inability to do those tasks and services that he ordinarily would have been able to perform;
- E. The physical pain and suffering Plaintiff Franz Suhadolnik has endured and will continue to endure because of the severe and permanent injury he sustained;
- F. The mental anguish and severe emotional distress Plaintiffs have suffered and will continue to suffer;
- G. Reasonable attorney fees; and
- H. For the costs of prosecuting and presenting the evidence in this case.

Considering each of these elements of damages, Plaintiffs have suffered damages in excess of Ten Thousand Dollars (\$10,000.00).

25. Plaintiffs respectfully request that a jury determine the amount of the losses they have incurred in the past and will incur in the future, not only from a financial standpoint, but also in terms of good health and freedom from pain and worry.

PRAYER

WHEREFORE, Plaintiffs pray for judgment in their favor and against Defendants for:

- A. as to all Counts: damages, both special and general, in favor of Plaintiffs in an amount to be determined at trial;
- B. reasonable attorney fees;
- C. costs of prosecuting and presenting the evidence of this case; and
- D. such other and further relief as the Court deems just and proper.

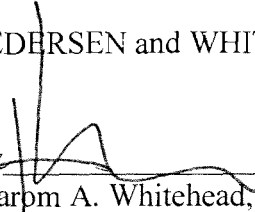
DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by a jury of at least twelve (12) members on all issues in the above-entitled matter.

000009

DATED this 1st day of May, 2008.

PEDERSEN and WHITEHEAD

By 
Jarom A. Whitehead, ISB #6656
Attorneys for Plaintiff

PEDERSEN and WHITEHEAD
ATTORNEYS AT LAW
161 5TH AVENUE SOUTH, SUITE 301
BOX 2349
TWIN FALLS, ID 83303-2349
PHONE 208/734-2552

000010

NOV 24 2008

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Jeremiah A. Quane, ISB No. 977
Terrence S. Jones, ISB No. 5811
Angela K. Hermosillo, ISB No. 7425
QUANE SMITH LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants
Scott H. Pressman, M.D. and
The Eye Associates, P.A.

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

ANSWER AND DEMAND FOR
JURY TRIAL

COME NOW Defendants Scott H. Pressman, M.D., and The Eye Associates,
P.A., by and through their counsel of record, Quane Smith LLP, and answer the Complaint
and Demand for Jury Trial as follows:

ANSWER AND DEMAND FOR JURY TRIAL - 1

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FIRST DEFENSE

The Complaint and Demand for Jury Trial fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I.

Defendants deny each and every allegation of the Complaint and Demand for Jury Trial not herein expressly and specifically admitted.

II.

Admit that Defendant The Eye Associates, P.A. is an Idaho corporation with its principal place of business in Boise, Idaho.

III.

Admit that Defendant Scott Pressman, M.D., is a licensed physician in the State of Idaho and that he rendered medical services to Plaintiff Franz Suhadolnik.

IV.

Admit that Plaintiff Franz Suhadolnik had bilateral cataracts and that he underwent cataract surgery on his right eye performed by Defendant Scott Pressman, M.D. on May 31, 2006.

THIRD DEFENSE

Plaintiffs were negligent and careless in connection with the matters and damages alleged which proximately caused and contributed to said events and resultant damages, if any.

FOURTH DEFENSE

Other persons or entities may be guilty of negligent and careless misconduct at the time of and in connection with the matters and damages alleged, which misconduct proximately caused and contributed to said events and resultant damages, if any.

FIFTH DEFENSE

Plaintiffs have failed to mitigate their damages.

SIXTH DEFENSE

Plaintiffs have waived the right, or are estopped to assert the various claims and causes of action alleged against Defendants.

SEVENTH DEFENSE

Plaintiffs are not the real party in interest as respects their claims for medical expense, contrary to Rule 17, Idaho Rules of Civil Procedure.

WHEREFORE, Defendants pray that Plaintiffs take nothing by their Complaint, that the same be dismissed, and that Defendants be awarded their costs of suit and attorney fees, and such other and further relief as the Court deems just.

DEMAND FOR JURY

Defendants hereby demand a jury trial of not less than twelve (12) persons.

DATED this 24th day of November, 2008.

QUANE SMITH LLP

By



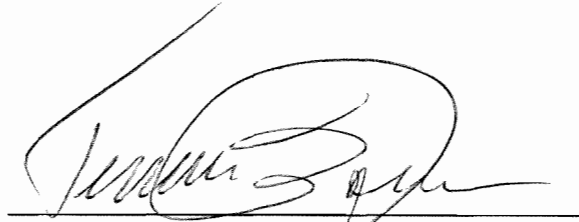
Terrence S. Jones, Of the Firm
Attorneys for Defendants
Scott H. Pressman, M.D. and The Eye
Associates, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2008, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Jarom A. Whitehead
PEDERSEN AND WHITEHEAD
161 5th Avenue South, Suite 301
P.O. Box 2349
Twin Falls, Idaho 83303-2349
Telephone (208) 734-2552
Attorneys for Plaintiffs

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile (208) 734-2772



Terrence S. Jones

56 of the Idaho Rules of Civil Procedure, for an Order entering summary judgment in favor of said Defendants on the grounds that there are no genuine issues as to any material fact and that Defendants are entitled to judgment as a matter of law.

This Motion is based upon the documents and pleadings on file herein and the Affidavit of Scott H. Pressman, M.D., Affidavit of Counsel and Memorandum in support filed contemporaneously herewith. Oral argument is hereby requested.

DATED this 13th day of November, 2009.

CAREY PERKINS LLP

By 

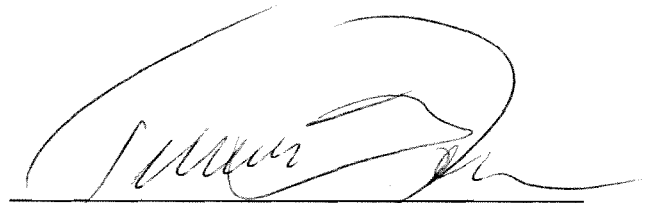
Terrence S. Jones, Of the Firm
Attorneys for Defendants
Scott H. Pressman, M.D. and The Eye
Associates, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2009, I served a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Jarom A. Whitehead
PEDERSEN & WHITEHEAD
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, Idaho 83303-2349
Telephone (208) 734-2552
Attorneys for Plaintiffs
Franz Suhadolnik and Betty Suhadolnik

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 734-2772


Terrence S. Jones

Terrence S. Jones, ISB No. 5811
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Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants
Scott H. Pressman, M.D., Scott H. Pressman,
M.D., L.L.C., and The Eye Associates, P.A.

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

AFFIDAVIT OF COUNSEL IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

NO. _____ FILED _____ 432
A.M. _____ P.M. _____

NOV 14 2009

J. DAVID NAVARRO, Clerk
By A. BOURNE
DEPUTY

County of Ada)

says:

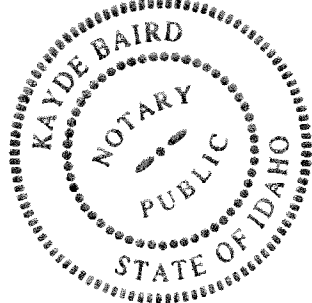
1. I am a member of the law firm of Carey Perkins LLP, attorneys of record for Defendants in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. That attached hereto as **Exhibit A** is a true and correct copy of the deposition transcript of Plaintiff Franz Suhadolnik taken in this matter on October 21, 2009.

3. That attached hereto as **Exhibits B, C and D** are a true and correct copies of the informed consent documents signed by Plaintiff Franz Suhadolnik prior to his May 31, 2006 cataract surgery performed by Dr. Pressman. Plaintiff Franz Suhadolnik authenticated his signatures on each of these three documents. See deposition testimony of Plaintiff Franz Suhadolnik at p. 98, ll. 24 thru p. 100, ll. 10; p. 69, ll. 17 thru p. 70, ll.

Terrence S. Jones

SUBSCRIBED AND SWORN to before me this 13th day of November, 2009.



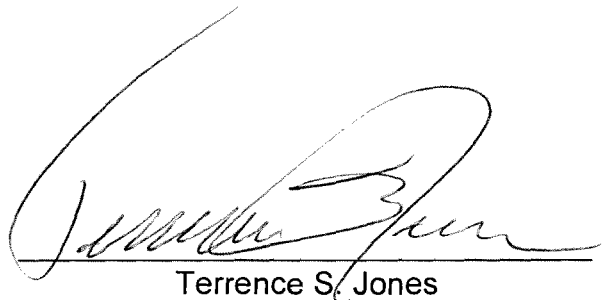
Notary Public for Idaho
Residing at Boise, Idaho
My Commission expires 9/18/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2009, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Jarom A. Whitehead
PEDERSEN & WHITEHEAD
161 5th Avenue South, Suite 301
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Attorneys for Plaintiffs
Franz Suhadolnik and Betty Suhadolnik

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 734-2772



Terrence S. Jones

Exhibit A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK AND)
BETTY SUHADOLNIK, INDIVIDUALLY AND)
AS HUSBAND AND WIFE,)

)
Plaintiffs,) Case No.

vs.) CV PI 0808249

SCOTT H. PRESSMAN, M.D., SCOTT H.)
PRESSMAN, M.D., A LIMITED LIABILITY)
COMPANY, THE EYE ASSOCIATES, P.A.,)
AN IDAHO CORPORATION, AND BUSINESS)
ENTITIES 1 THROUGH X, AND JOHN DOE)
AND JANE DOE, HUSBAND AND WIFE,)
1 THROUGH X,)

)
Defendants.)

)

DEPOSITION OF FRANZ SUHADOLNIK
OCTOBER 21, 2009

REPORTED BY:

DAWN MARIE PRIVETT, CSR No. SRT-965

Notary Public

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1 THE DEPOSITION OF FRANZ SUHADOLNIK was taken on
2 behalf of the Defendants at the law offices of
3 PEDERSEN & WHITEHEAD, 161 5th Avenue South, Suite #301,
4 Twin Falls, Idaho, commencing at 10:31 a.m. on
5 Wednesday, October 21, 2009, before Dawn Marie Privett,
6 Certified Shorthand Reporter and Notary Public within
7 and for the State of Idaho, in the above-entitled
8 matter.

9
10 APPEARANCES:

11
12 For Defendant: QUANE SMITH LLP
13 BY: TERRANCE S. JONES
14 101 South Capitol Blvd.
15 P.O. Box 519
16 Boise, ID 83701

17
18 For Plaintiffs: PEDERSEN AND WHITEHEAD
19 BY: JAROM A. WHITEHEAD
20 161 5th Avenue South, Suite #301
21 P.O. Box 2349
22 Twin Falls, ID 83303-2349

23
24 Also Present: BETTY SUHADOLNIK
25

Page 2

1 FRANZ SUHADOLNIK,
2 first duly sworn to tell the truth relating to said
3 cause, testified as follows:
4 (Exhibits 1 through 3 were marked.)

5
6 EXAMINATION

7 BY MR. JONES:

8 Q. Would you please state your full name for the
9 record?

10 A. Franz M. Suhadolnik.

11 Q. All right. Now, I'm sure I'm not the first
12 person, but your name will challenge me throughout the
13 day. So if I pronounce it incorrectly, I apologize.

14 A. I'll accept that ahead of time.

15 Q. Would it be easier for me to call you Franz
16 today?

17 A. That's fine.

18 Q. All right. Thank you.

19 Let the record reflect this is the time and
20 place set for the taking of the deposition of Franz
21 Suhadolnik pursuant to notice and the Idaho Rules of
22 Civil Procedure.

23 Did you receive a copy of your Notice of
24 Deposition today, Franz?

25 A. I received it some time ago.

Page 4

1 (Pages 1 to 4)

1 Q. I'm showing you what's been marked as
2 Exhibit I to your deposition, correct?
3 A. Right.
4 Q. You've had a chance to see that document
5 before today?
6 A. Yes.
7 MR. JONES: Counsel, is there anything more to
8 be produced today?
9 MR. WHITEHEAD: No, I don't think so.
10 MR. JONES: Okay. Just in the event something
11 comes up during our discussion that indicates there are
12 some other materials out there that I don't have, not
13 that I expect that, but just in the event that occurs,
14 I'll reserve the right to address that in a further
15 deposition, if necessary. But that's only if something
16 comes up that I don't have.
17 Q. BY MR. JONES: You understand that I'm one of
18 the attorneys representing Dr. Pressman and The Eye
19 Associates in this matter?
20 A. Yes, sir.
21 Q. Have you ever had your deposition taken
22 before?
23 A. In this case?
24 Q. In any case. In any matter in your life.
25 A. Yes, I have.

Page 5

1 Q. Can you tell me what the context was?
2 A. You want all three of them?
3 Q. Sure.
4 A. I was chairman of the school board. We were
5 required -- forced to RIF some teachers, and we were
6 sued by the State Teachers' Association. And I was
7 deposed in that.
8 Q. When was that?
9 A. 1969, '70.
10 Q. Next time?
11 A. I had a patient who was involved in an
12 automobile accident. And I testified in her case and
13 was deposed.
14 Q. When was that?
15 A. That must have been in mid '70s.
16 Q. The third time?
17 A. After I left the practice of dentistry, I
18 brokered professional practices. And I testified or was
19 deposed in a case involving where the -- did a practice
20 appraisal for a divorce. And the wife's -- I was
21 involved in testifying in the marriage dispute over the
22 accuracy of my appraisal.
23 Q. So I want sure to make sure I understand.
24 You were asked to perform an appraisal on a
25 dental practice?

Page 6

1 A. Yes.
2 Q. So you testified --
3 A. My client's wife contested the -- attorney
4 contested the amount of the appraisal.
5 Q. So you testified in that capacity?
6 A. Yeah.
7 Q. When was that?
8 A. Probably about 1980 -- about 1995.
9 Q. Is that something that you do now, is you
10 perform appraisals of dental practices?
11 A. I could. I don't anymore.
12 Q. When did you stop doing that?
13 A. About 2000. We appraise all types of
14 professional practices.
15 Q. You still do?
16 A. We did at that time, yeah.
17 Q. We'll go over that in a little more detail in
18 a few minutes.
19 Given the fact that you've testified in
20 depositions and/or trial -- because it sounds like you
21 did deposition and trial, correct?
22 A. Yes.
23 Q. You've testified in trial at least twice?
24 A. Yes.
25 Q. You've been deposed three times?

Page 7

1 A. Yes.
2 Q. You understand how this question-and-answer
3 format works, correct?
4 A. Vaguely, yeah.
5 Q. Your attorney may have spent some time talking
6 to you about this. I don't want to belabor the point.
7 But just so you understand, we don't need to talk over
8 one another today.
9 A. Yeah.
10 Q. All of your answers need to be verbal: Yes,
11 no, I don't know, or some variation thereof, or some
12 explanation. No uh-huhs or huh-uhs or nodding or
13 shaking your head because everything that's being said
14 is taken down by our court reporter here. All right?
15 A. (No audible response.)
16 Q. I need a yes or no.
17 A. Yes.
18 Q. If you don't understand any of my questions,
19 and as we go through the day, some of these questions
20 may be confusing to you, for any reason, if that's the
21 case, please ask me or indicate that you don't
22 understand my question, and I'll be happy to rephrase
23 it. All right?
24 A. Okay.
25 Q. If you answer my question, I'll assume you

Page 8

2 (Pages 5 to 8)

1 understood it. Fair enough?
2 A. Yes.
3 Q. I need you to acknowledge that you understand
4 that the oath you've taken that the court reporter gave
5 to you at the start of our deposition has the same force
6 and effect as if you were testifying live in front of a
7 court.
8 Do you understand that?
9 A. Yes.
10 Can I defer to my attorney and ask him a
11 question?
12 Q. If you need to take a break to ask your
13 attorney a question, you let me know, and I'll
14 accommodate you in that regard.
15 MR. WHITEHEAD: Do you need to take a break
16 and ask me a question?
17 Q BY MR. JONES: The only thing I ask is if I
18 have a question pending, that you answer my question
19 before we take a break.
20 A. Okay. But I can't communicate with the
21 attorney while I'm sitting here?
22 MR. WHITEHEAD: Not to help you answer
23 questions.
24 THE WITNESS: No. But to clarify something.
25 MR. WHITEHEAD: We can take breaks as needed.

Page 9

1 THE WITNESS: Or whether I should give an
2 opinion or when I'm not sure or something like that.
3 MR. JONES: I guess we'll take that on a
4 case-by-case basis as it comes up.
5 MR. WHITEHEAD: Yeah.
6 Q. BY MR. JONES: Again, if you need to take a
7 break for any reason, you just let me know, as long as I
8 don't have a question pending.
9 A. Yeah.
10 Q. I expect you to answer my question before we
11 take a break.
12 A. Okay.
13 Q. Fair enough?
14 A. Fair enough.
15 Q. Are you on any medication that would impact
16 your ability to answer my questions here today?
17 A. No.
18 Q. Can you tell me what medications you are
19 currently taking for any reason?
20 A. Just the medications I'm currently taking?
21 Q. Correct.
22 A. I'm taking Lisinopril and Simvastatin and
23 Flomax.
24 Q. Who prescribed those medications to you?
25 A. Dr. Paris in Hailey, Idaho.

Page 10

1 Q. Tell me briefly what the three medications as
2 you understand them to be are for.
3 A. Lisinopril was for high blood pressure, but
4 he's about to take me off that. The Simvastatin is for
5 cholesterol, and the Flomax is difficulty in emptying my
6 bladder.
7 Q. So you have some difficulty emptying your
8 bladder, and this is the route you've taken to try to
9 address that problem?
10 A. Yeah, Flomax helps.
11 Q. So you think that drug has been effective in
12 helping you with that problem?
13 A. Yes.
14 Q. Are you currently taking any eye medication or
15 any drops or anything at all for your eyes?
16 A. Not at this time.
17 Q. Any of my questions that I ask you today, I'm
18 not intending and not entitled to ask you about
19 conversations you've had with your attorney.
20 But beyond conversations that you may have had
21 with your counsel, what else did you do to prepare for
22 your deposition here today?
23 A. I reviewed the dates of the chronology from
24 the time I discovered I had a problem until the problem
25 was -- I received the final treatment. But the problem

Page 11

1 is still there, and I may go back for further treatment.
2 Q. Did you review your medical records?
3 A. Not thoroughly, no.
4 Q. Have you looked at your medical records?
5 A. Yes.
6 Q. When was the last time that you looked at your
7 medical records?
8 A. Oh, probably a week ago.
9 Q. Were those the records from The Eye
10 Associates?
11 A. I believe they were included.
12 Q. That includes the records of Dr. Pressman?
13 A. Yes.
14 Q. What other records did you review?
15 A. I reviewed my records from Dr. Paris, who did
16 the pre-op exam, and my records from the Moran Eye
17 Center.
18 Q. Any other records?
19 A. No.
20 Q. Have you reviewed any depositions?
21 A. No.
22 Q. So you haven't reviewed Dr. Pressman's
23 deposition?
24 A. No.
25 Q. Anything else that you've looked at or

Page 12

3 (Pages 9 to 12)

1 reviewed?
 2 A. No.
 3 Q. This chronology that you talked about of care,
 4 was this just based on your review of the records, or is
 5 this some document that you have?
 6 A. We have a lot of it documented in our
 7 Daytimers. In other words, when I went to the Moran Eye
 8 Center for treatment, I usually had that date in my
 9 appointment book so I could go back and review those.
 10 Q. You have an appointment book at home that sets
 11 forth chronology of all the dates of treatment?
 12 A. Not exactly, but I could come up with those.
 13 Q. What else does your Daytimer include other
 14 than just the dates of treatment?
 15 A. Oh, various appointments that I might have
 16 with a doctor or a colleague or city council meeting or
 17 birth dates or anniversary.
 18 Q. With respect to this case, though. And I
 19 appreciate your answer. I just wasn't specific enough.
 20 Does it include any information about the care
 21 that you were receiving for your eye or your thoughts or
 22 impressions about what's going on?
 23 A. No. It's not a diary.
 24 Q. All it includes are dates of treatment?
 25 A. Yeah.

Page 13

1 Q. And who you're going to see?
 2 A. A date to -- I make an appointment with you
 3 for next week. I put it down in that book so I don't
 4 forget it.
 5 Q. How far back do you have those calendars,
 6 those Daytimers?
 7 A. Oh, possibly two or three years.
 8 Q. Do you have them going back to when this care
 9 in question was provided?
 10 A. Possibly.
 11 Q. So you may have your Daytimers from 2005 and
 12 2006?
 13 A. Yeah. But not everything went into my
 14 Daytimers. Some was an appointment card that's put on
 15 my desk and so forth.
 16 Q. I would ask that you go home and look for
 17 those. And if you have those materials, to provide them
 18 to your attorney because I'd be interested in seeing
 19 just what information that you have contained in there
 20 relating to this case.
 21 A. Yeah.
 22 Q. Obviously birthdays and anniversaries are not
 23 of relevance to me.
 24 A. But it would be very sparse. It would be like
 25 an appointment with Dr. Pressman on such and such a

Page 14

1 date.
 2 Q. Okay. Fair enough.
 3 Anything else that you did to prepare for your
 4 deposition today?
 5 A. No.
 6 Q. What is your current address?
 7 A. My mailing address is P.O. Box 944,
 8 Sun Valley.
 9 Q. So you have a physical address. Your home is
 10 in Sun Valley?
 11 A. Yes.
 12 Q. How long have you lived there?
 13 A. Ten years.
 14 Q. Who lives with you there currently?
 15 A. My wife.
 16 Q. Who is sitting here in the room with us?
 17 A. Yes.
 18 Q. In 2005 and 2006, did anyone else live with
 19 you besides your wife?
 20 A. No.
 21 Q. What is your age?
 22 A. 78.
 23 Q. Where were you born?
 24 A. In Spokane, Washington.
 25 Q. How long have you been in Idaho?

Page 15

1 A. Since 1999. Permanent since 1999.
 2 Q. Where did you live before that?
 3 A. Mulkiteo, Washington.
 4 Q. So did you move to Idaho to retire
 5 essentially?
 6 A. I moved to Idaho to get away from Washington.
 7 Q. Lots of people move to Idaho to get away from
 8 somewhere.
 9 All right. Your wife's name is Betty,
 10 correct?
 11 A. Yes.
 12 Q. You were married to her in 2005 and 2006,
 13 correct?
 14 A. Was I married then, or did I marry her then?
 15 Q. Were you married then?
 16 A. I was married then, yes.
 17 Q. When did you marry Betty?
 18 A. In 1973.
 19 Q. In the last -- since 2005, do you have any
 20 regular contact with any family members regarding issues
 21 in this case?
 22 A. Regarding issues in this case?
 23 Q. Yes.
 24 A. No.
 25 Q. Do you have any children?

Page 16

4 (Pages 13 to 16)

1 A. Two.
 2 Q. What are their names, ages and locations?
 3 A. One's name is Craig, same last name; Curt,
 4 same last name. They're located in Washington state.
 5 They're -- what -- 49 and 50?
 6 Q. What do they do?
 7 BETTY SUHADOLNIK: I think they're 50 and 51
 8 now. I don't know.
 9 THE WITNESS: One is in the electronic
 10 business. And the other one was a Boeing employee.
 11 Q. BY MR. JONES: So I take it, neither of your
 12 boys helped to care for you after you had eye surgery?
 13 A. No.
 14 Q. Franz, tell me about your educational
 15 background.
 16 A. You want the schools I attended?
 17 Q. Yes.
 18 A. I attended Gonzaga University for pre-med,
 19 pre-dent. I attended Marquette University for dental
 20 school.
 21 Q. When did you graduate from Gonzaga?
 22 A. I didn't graduate.
 23 Q. Okay. When did you go to Marquette?
 24 A. In 1953.
 25 Q. When did you complete your training at

Page 17

1 Marquette?
 2 A. '56.
 3 Q. What degree did you have?
 4 A. DDS.
 5 Q. Any education beyond that?
 6 A. I attended -- when I started preparing myself
 7 in a career other than dentistry, I went to Lynwood
 8 Community College in Washington state.
 9 Q. When was that?
 10 A. About 1985.
 11 Q. Did you receive a degree or certificate?
 12 A. No.
 13 Q. What training did you acquire there?
 14 A. Business. I was going to go to law school,
 15 but --
 16 Q. Wise decision avoiding that.
 17 So you went to Gonzaga. Then you went to
 18 Marquette. You finished with a degree in dentistry.
 19 A. Yes.
 20 Q. And that was in 1956?
 21 A. Yes.
 22 Q. Did you thereafter practice dentistry?
 23 A. I spent two years in the Army and then
 24 practiced dentistry for 30 years.
 25 Q. Where did you serve in the Army?

Page 18

1 A. In Korea.
 2 Q. Where did you serve your 30 years as a
 3 dentist?
 4 A. In Lake Stevens, Washington.
 5 Q. Tell me little bit about your practice of
 6 dentistry.
 7 A. It was a family practice.
 8 Q. Were you in a group or by yourself?
 9 A. I was by myself.
 10 Q. What kind of population size is Lake Stevens,
 11 Washington?
 12 A. It's a -- the town itself at the time was
 13 quite small, but it was a large population around a lake
 14 which was around the town. I'd say the school district
 15 there was probably 3,000.
 16 Q. What was your patient size, your population
 17 for your practice?
 18 A. My draw area?
 19 Q. Yeah.
 20 A. Oh, probably 10,000. People came to me from
 21 Alaska.
 22 Q. You must have good hands.
 23 A. No. It was cheaper than Alaska.
 24 Q. I understand you're currently retired,
 25 correct?

Page 19

1 A. Yes.
 2 Q. When did you retire?
 3 A. From my first or second career?
 4 Q. Let's start with the first one.
 5 A. In 1987.
 6 Q. Did you sell your practice?
 7 A. Yes.
 8 Q. Then -- let's see -- you indicated that you
 9 went to this Lynwood College, Community College in '85.
 10 A. Yeah.
 11 Q. So when did you finish up your Lynwood
 12 education?
 13 A. I didn't finish. I went there -- dentistry is
 14 a very narrow education. I went there to broaden my
 15 education so I could go into the business world.
 16 Q. And then you started your second career after
 17 '87?
 18 A. Yes.
 19 Q. That career was?
 20 A. I was a stockbroker for four years.
 21 Q. Did you work for someone?
 22 A. I worked for Painter Financial Group in
 23 Bellevue, Washington.
 24 Q. For who?
 25 A. Painter Financial Group.

Page 20

5 (Pages 17 to 20)

1 Q. So you did that until -- from when to when?
 2 A. Oh, probably from '88 -- 1988 to 1992.
 3 Q. Tell me what you did as a stock broker.
 4 A. I was a financial adviser. I helped people
 5 buy and sell stocks and bonds and et cetera.
 6 Q. Was that something you did out of your house
 7 or in an office setting?
 8 A. No. I did it at an office.
 9 Q. What did you do after 1992?
 10 A. I was involved in brokering professional
 11 practices.
 12 Q. How long did you do that?
 13 A. Till I moved to Sun Valley in -- I think I did
 14 it for a year after I moved to Sun Valley. So about --
 15 until about 2000.
 16 Q. When you say professional practices, tell me
 17 what that includes.
 18 A. Medical, dental, veterinarian, optometry.
 19 Q. When you say medical, were you involved in the
 20 sales of any ophthalmology groups?
 21 A. No. Ophthalmology was one of the least
 22 successful of our endeavors because of the encroachment
 23 by people, groups like Costco and the big eye centers
 24 and so forth; so there weren't that many ophthalmology
 25 practices available.

Page 21

1 Q. Let's talk about your dental practice for a
 2 minute.
 3 How many employees did you have?
 4 A. At the most, six.
 5 Q. That would include reception area people and
 6 that would include your dental assistants.
 7 Who else would that include?
 8 A. Hygienists.
 9 Q. Did you do general dentistry?
 10 A. (No audible response.)
 11 Q. Is your answer yes?
 12 A. Yes, everything.
 13 Q. So orthodontics?
 14 A. Some.
 15 Q. What else?
 16 A. Endodontics, oral surgery, operative
 17 dentistry, crown and bridge, periodontology.
 18 Q. When you say you did operative dentistry, tell
 19 me what that included.
 20 A. That includes fillings, crowns.
 21 Q. Did you remove wisdom teeth?
 22 A. Only if I had to. I preferred to refer those
 23 to an oral surgeon.
 24 Q. So what sort of activities would your dental
 25 assistants do for you?

Page 22

1 A. They assisted me, handed me instruments,
 2 cleaned up, mixed the compounds.
 3 Q. Did your dental assistants perform any part of
 4 your charting for you?
 5 A. No. I did my own charting.
 6 Q. So when you were filling a tooth or something
 7 like that, they didn't mark on the forms anything?
 8 A. No. After I completed the procedures, I wrote
 9 down what I did.
 10 Q. Did you rely on your assistants to do any
 11 patient intake for you?
 12 A. My -- when a new patient came in, we had
 13 them -- in the early days of my practice, there was no
 14 dental insurance; so everything was fee for service. So
 15 we had the patients fill out a financial form, credit
 16 form. And if they wanted credit, we checked their
 17 credit. And then we had the patients give us a health
 18 history. And then I went over that with the patient.
 19 Q. So the patient gave you a health history?
 20 A. Yes. They filled out a form.
 21 Q. Did that process change, or was that the way
 22 it was until you retired?
 23 A. That was pretty much the way it was until I
 24 retired.
 25 Q. So that wasn't with one of your dental

Page 23

1 assistants? That was -- when the patient would come in,
 2 they were given a form. They filled out the form. And
 3 then when they saw you, you went over it with them?
 4 A. Yes, at the examination appointment.
 5 Q. Okay. Now, you said you performed extractions
 6 as part of your practice.
 7 A. Yes.
 8 Q. And root canals.
 9 A. Yes.
 10 Q. Did you use any kind of anesthesia?
 11 A. Used local anesthesia.
 12 Q. So even if you were removing a wisdom tooth,
 13 that's all you relied upon, was local anesthesia?
 14 A. Yes. If the patient needed general
 15 anesthesia, I referred them to a specialist.
 16 Q. So you never used gas or anything like that?
 17 A. Used nitrous oxide, but just as a relaxant.
 18 Q. What do you understand that means when you use
 19 nitrous oxide as a relaxant?
 20 A. What does that mean?
 21 Q. Yeah. What does that do to the patient?
 22 A. It relaxes the patient.
 23 Q. Like Versed?
 24 A. Pardon?
 25 Q. Like Versed?

Page 24

6 (Pages 21 to 24)

1 A. Versed?
2 Q. Yeah. Like the medication Versed?
3 A. I've never heard of Versed.
4 Q. Is the nitrous oxide something that is just
5 breathed by the patients?
6 A. Breathed by the patient. It's controlled.
7 And it simply relaxes them. It doesn't put them to
8 sleep. It relaxes them.
9 Q. So it's like they're awake, but they're
10 relaxed?
11 A. They're awake but relaxed.
12 Q. So is it something that's done for anxiety
13 purposes, or to make it so that you have a patient
14 that's not jumping around?
15 A. Both. I'd say people have improved as years
16 have gone along as far as their acceptance of dentistry.
17 But dentistry has also improved, too. And probably
18 90 percent of your patients are apprehensive. And some
19 to the point where they need to be put to sleep to have
20 anything done. Others, you can give a sedative.
21 In those days, we used barbiturates. Or you
22 can use nitrous oxide. Nitrous oxide wasn't commonly
23 used in dental practice until probably the middle '70s.
24 Q. When you say you used barbiturates, what kind
25 of barbiturates would you use?

Page 25

1 A. Phenobarbital.
2 Q. Anything else?
3 A. That was pretty much the drug of choice in
4 those days.
5 Q. This was an oral pill that you gave your
6 patients?
7 A. Yes.
8 Q. It was intended to relax them?
9 A. Right.
10 Q. So then as part of your practice then, you
11 were used to giving injections of local anesthetic?
12 A. Yes.
13 Q. And you were used to providing either
14 barbiturates or nitrous oxide to relax your patients?
15 A. Not routinely.
16 Q. But that was part of your practice?
17 A. Yeah, a small number.
18 Q. When you were going to give your patients any
19 of these forms of either relaxants or anesthetics, did
20 you have your patients complete any paperwork before you
21 did that?
22 A. I had them -- I checked their health history
23 to see if they were allergic to anything, see if they
24 could take Penicillin, because sometimes we'd medicate
25 people with heart conditions with Penicillin. I also

Page 26

1 checked with their physician routinely.
2 Q. If I came to your office and I was going to
3 have an extraction and you were going to use a local
4 anesthetic and administer nitrous oxide to relax me, are
5 you saying that you would have talked to my physician
6 before you did that procedure?
7 A. Depending on what your health history showed.
8 Q. Maybe yes? Maybe no?
9 A. Maybe yes. Maybe no.
10 Q. In the instances where you would check up with
11 a patient's physician based on something you saw in
12 their health history, can you give me an example of
13 something that would have made you think, I need to
14 check with their health care provider before I use this
15 anesthetic?
16 A. If the patient had some kind of cardiac
17 problem, some type of allergy, was allergic to certain
18 drugs, had maybe had problems with local anesthesia.
19 Any of those, we would check with the physician.
20 Q. What would you do? What were you going to
21 check with them for?
22 A. I was going to get the physician's okay or not
23 okay to proceed with using that particular drug or
24 anesthesia.
25 Q. Would you consider that to be akin to a

Page 27

1 medical clearance?
2 A. Sometimes. Sometimes the physician says, "I
3 don't know. But if the guy is pain, you got to do it
4 anyway. So go for it."
5 Sometimes we refer them to a specialist.
6 Sometimes we put them in the hospital.
7 Q. But in the instances where you were wanting to
8 provide treatment in your role as a dentist and you had
9 concerns based on a patient's health history as to
10 whether or not an anesthetic or one of these
11 barbiturates or nitrous oxide would be appropriate for
12 that patient, if you contacted their -- say, for
13 example -- their primary care physician, and you said,
14 "This is what I want to do. Do you think this patient
15 is suitable to go through that procedure?" If they said
16 yes, then you'd go ahead with it?
17 A. Sometimes. Sometimes I'd refer them to a
18 specialist.
19 Q. Depending on what was within your comfort
20 level?
21 A. Yes.
22 Q. Why was it important to you obtain a health
23 history form on your patients as a dentist?
24 A. Because without one, I was told in part of my
25 education in dental school that you were extremely

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7 (Pages 25 to 28)

1 liable for anything that would happen to the patient if
2 you didn't. It was good just good common -- it was a
3 reasonable expected treatment to get a health history on
4 every patient.

5 Q. Why did you want to know? Aside from your
6 training as a dentist, why did you want to know what a
7 patient's health history was?

8 A. Well, because I didn't want to do an
9 extraction, for instance, on certain patients that had a
10 history of heart problems without premedicating.

11 Q. So in other words, the patient's health
12 history was important to you as a dentist because it
13 might impact the course of treatment that you provide?

14 A. It could influence the course of treatment
15 that I would provide. It could influence whether I went
16 ahead and treated that patient. And it included how I
17 wanted to go about treating the patient.

18 Q. So the health history was important to you
19 then in your role as a dentist for many reasons?

20 A. Yes.

21 Q. You relied on your patients to be honest with
22 you in describing their health history?

23 A. Both what they had written and verbally.

24 Q. So the answer to the question is, yes, you
25 relied on your patients to be honest with you?

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1 A. Sometimes we'd check with their physician in
2 addition.

3 Q. When a patient filled out a health history
4 form for you as their dentist, you relied on them to be
5 honest with you as to the information they disclosed,
6 correct?

7 A. Yes. But we followed it up with going over
8 with them verbally. Sometimes things would be disclosed
9 verbally that weren't disclosed on their health history.

10 Q. I appreciate the second part of your
11 description.

12 My question to you is, as a dentist, somebody
13 who has served for 30 years, isn't it true that you
14 relied on your patients to be honest with you in the
15 information they relayed in their health history form;
16 yes or no?

17 MR. WHITEHEAD: Terry, I think he answered it
18 already.

19 THE WITNESS: Do you want me to answer it
20 again?

21 MR. WHITEHEAD: Go ahead. But this is getting
22 ridiculous.

23 THE WITNESS: Not necessarily. I checked.

24 Q. BY MR. JONES: I want to understand your
25 testimony.

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1 A. Yeah.

2 Q. So you're telling me that you did not rely on
3 your patients to be honest with you when they completed
4 their health history forms; is that what you're telling
5 me?

6 MR. WHITEHEAD: Object to the form.

7 THE WITNESS: Not completely.

8 Q. BY MR. JONES: Explain it to me then.

9 A. People some people don't want to disclose to
10 you what their true conditions might be and so forth.
11 Some people forget to mention certain drugs that they
12 might be allergic to and so forth.

13 For instance, a certain number of patients, we
14 premedicated with injecting Penicillin into them.
15 Before I injected Penicillin in a patient, I not only
16 checked with them verbally to see that they weren't
17 allergic to it, but I checked with their physician to
18 see that they weren't allergic to it.

19 Q. So you would delay the procedure, and you
20 would call their primary care provider in every instance
21 before you treated one of your patients by providing
22 them with any injections?

23 A. Not every instance. It was a judgment call.

24 Q. How did you decide how to make that judgment
25 call?

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1 A. The same way that you would when somebody
2 comes into your office and says, "I'm in pain. Can you
3 give me Percodan?" It raises a red flag.

4 Q. So it's subjective. It's just based on your
5 experience?

6 A. Yes. Because if somebody is in pain, they
7 don't ask for Percodan. They say, "Can you do something
8 for me?" So when they ask for a specific narcotic, it
9 immediately raises suspicions that this person is
10 looking for drugs.

11 Q. So you have, by your own testimony, some
12 30 years of experience of reviewing health history
13 forms, correct?

14 A. Yes.

15 Q. So you, by your own admission, have 30 years
16 of discussing with patients the information contained in
17 their health history forms, correct?

18 A. Yes.

19 Q. You, yourself, understand the importance,
20 having served as a dentist for 30 years and having
21 reviewed health history forms, of a patient being honest
22 in completing those forms and describing to you their
23 health history, correct?

24 A. Yes.

25 Q. Is your answer yes?

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8 (Pages 29 to 32)

1 A. Yes.
2 Q. When you would follow up with a patient's
3 health care provider if you had specific questions or
4 concerns before you provided a course of treatment,
5 would you send a request for written information from
6 the doctor, or would you just say to the doctor, "I'm
7 calling you up. I want to know if Bob can undergo this
8 procedure"?
9 A. Sometimes we would request written
10 information. Sometimes we would abide by what the
11 doctor told us verbally.
12 Q. What would be an instance where you would
13 request something in writing?
14 A. If it wasn't an emergency at that particular
15 time, if the treatment could be delayed.
16 Q. How would you go about getting that
17 information back from the health care provider?
18 A. We just asked the doctor to send us a note
19 saying that it was okay to proceed with giving them the
20 particular medicine or that he had cleared the person
21 for the particular medicine.
22 Q. So that was the answer you were looking for,
23 was you wanted to know is the patient cleared for what
24 you want to do?
25 A. Yes.

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1 Q. That's the information you were looking to
2 receive from the physician?
3 A. Yes.
4 Q. So you indicated that not only did you have
5 your patients fill out a health history form, but you
6 also went over that history form with them?
7 A. Yes.
8 Q. Tell me again why it is that you would go over
9 the health history form with them.
10 A. There was sometimes specific questions that
11 would be raised by what they had filled out on their
12 health history. Just as a matter of routine, we always
13 went over the health history.
14 Q. So your habit and routine and custom as a
15 dentist was, when you got the health history form
16 completed by the patient, you would go over it with
17 them?
18 A. Yes. The patient -- the initial appointment
19 with the patient, unless it was an absolute emergency,
20 was an initial examination and consultation.
21 Q. How long would that take? I recognize there's
22 some variation. But in general?
23 A. We would normally save a half hour for them.
24 Q. For a new patient?
25 A. For a new patient.

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1 Q. And part of that time would include, not only
2 the examination, but discussing their health history
3 with them?
4 A. (No audible response.)
5 Q. Is your answer yes?
6 A. Yes.
7 Q. As a dentist, do you have some training in
8 pharmacology?
9 A. Yes.
10 Q. Tell me about your experience in -- going
11 back. Obviously, it's a while since you've had your
12 training. But you took classes on drugs when you were
13 in school?
14 A. Yes.
15 Q. What kind of classes would you take, if you
16 recall?
17 A. There was a class called Pharmacology.
18 Q. What would that cover?
19 A. It covered probably the medications that were
20 commonly used in dentistry.
21 Q. That would include different types of
22 antibiotics?
23 A. Yes.
24 Q. Different types of pain medications?
25 A. Yes.

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1 Q. Different kinds of sedatives?
2 A. Yes.
3 Q. What other drugs would it cover?
4 A. Dentists are allowed to prescribe just about
5 anything by law. But if you're getting too esoteric or
6 too exotic, a good pharmacist will catch that and say,
7 "Hey, a dentist shouldn't be prescribing this." So it's
8 fairly limited to the number of drugs that we prescribe.
9 It was mostly antibiotics, painkillers, and sedatives.
10 Q. As a dentist, wasn't it part of your standard
11 of practice to know whether or not any of the
12 medications you were going to be prescribing were going
13 to contradict or be contraindicated with other drugs the
14 patient was taking?
15 A. Yes.
16 Q. As a dentist then, you had to have knowledge
17 of what other drugs were out there to the extent they
18 would impact drugs that you might be using?
19 A. Yes. But that requires a lot of knowledge
20 because drugs change so fast so. So there again, if the
21 patient listed that he was taking certain medications,
22 we would check with his physician to see if what we
23 wanted to prescribe for him was acceptable.
24 Q. You would talk to pharmacists as well, I take
25 it?

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9 (Pages 33 to 36)

1 A. Yes.
2 Q. Over your 30 years of practice, did you have
3 occasion to take continuing-education courses?
4 A. Yes.
5 Q. Did any of those courses ever include updates
6 on medications?
7 A. I took a course on using nitrous oxide. I
8 gained a lot of my knowledge from detail people from the
9 pharmaceutical who called on me when new types of
10 Penicillin or antibiotics came out and so forth. But no
11 specific -- I can't remember a specific course on
12 pharmacology.
13 Q. So if I understand what you said a minute ago,
14 you're saying drug representatives would come to your
15 practice, your dental practice?
16 A. Yeah.
17 Q. They would educate you?
18 A. They would, for instance, tell me about a new
19 Penicillin that their company -- or a new type of
20 antibiotic that their company had developed and briefed
21 me on it and so forth.
22 Q. Did you also, as part of your dental practice,
23 subscribe to any journals or periodicals?
24 A. I subscribed to the Journal of the American
25 Dental Association, Children's Dentistry Journal.

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1 Q. Would you read those periodicals?
2 A. Yes.
3 Q. Would there be information in those
4 periodicals from time to time about drugs and the impact
5 of drugs on the practice of dentistry?
6 A. I'm sure there were.
7 Q. So you stopped practicing, you said, in '87?
8 A. Yeah. Approximately '86 or '87.
9 Q. Do you still have a dental license?
10 A. No.
11 Q. When did you get rid of it or let it lapse?
12 A. Probably about 1995.
13 Q. Have you ever practiced dentistry in the state
14 of Idaho?
15 A. No.
16 Q. So you've never been licensed in Idaho?
17 A. No.
18 Q. Other than Washington, any other states?
19 A. Oregon.
20 Q. Is that because you got cross-bordered?
21 A. No. No. I graduated from dental school. I
22 was due to go to the Army right away. And I had an
23 opportunity to take one board exam. In those days you
24 had to take a board exam in any state that you wanted to
25 practice. Now there are some states that have

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1 reciprocity with other states. But at that time you had
2 to pass the exam in that state. I had time to take the
3 Oregon board, which I did. Then when I came back from
4 Korea, I took the Washington board.
5 Q. Were you part of some national board
6 certification?
7 A. Not in those days.
8 Q. It didn't exist?
9 A. It didn't exist.
10 MR. JONES: Let's go off the record.
11 (A recess was taken.)
12 MR. WHITEHEAD: You wanted to put on the
13 record that we don't have a wage claim in this case.
14 That's my understanding. Dr. Suhadolnik has been
15 retired for years. So, no problem.
16 MR. JONES: With that, I will avoid asking
17 questions regarding past or future income issues based
18 on your representation, Counsel.
19 Q. BY MR. JONES: Franz, you said you've been
20 retired for several years. You talked about the year
21 2000 thereabouts, correct?
22 A. Yes, sir.
23 Q. What have you been doing with yourself for the
24 last few years?
25 A. Mowing my lawn and beating back weeds. I did

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1 quite a bit of skiing, bicycling, hiking. I day trade
2 the stock market. I'm amazingly busy.
3 Q. So the lawn mowing, the weeding, the skiing,
4 biking, hiking, day trading, are those activities you've
5 been engaging in for the last few years?
6 A. Yes.
7 Q. That would include 2005 forward?
8 A. Yes.
9 Q. Did you take any trips in 2005?
10 BETTY SUHADOLNIK: I don't remember.
11 THE WITNESS: I'm sure I did, but I don't
12 remember.
13 Q. BY MR. JONES: How about 2006?
14 THE WITNESS: Was that the trip we took in --
15 through the Panama Canal?
16 BETTY SUHADOLNIK: Huh-uh. That was in 2000,
17 I think.
18 THE WITNESS: The reason I'm having trouble is
19 I take -- we try to escape Sun Valley for a couple weeks
20 every February. And sometimes we take a cruise.
21 Sometimes we go to Mexico. Sometimes we go to
22 Las Vegas, whatever.
23 Q. BY MR. JONES: Have you done that every year
24 since 2005?
25 A. Yes.

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10 (Pages 37 to 40)

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1 Q. These trips, you usually fly to?
2 A. Usually, yes.
3 Q. Recognizing that your wife is here in the
4 room, she also is also similarly busy with her own
5 activities?
6 A. Yes.
7 Q. Is she working?
8 A. She volunteers at the hospital, serves on a
9 couple of boards, and occasionally helps out a lady in
10 her shop when the lady travels.
11 Q. Are you currently on Medicare?
12 A. Yes.
13 Q. When did you first get on Medicare, if you
14 recall?
15 A. Let's see.
16 Q. Was it when you turned 65?
17 A. No. I think I was 68. But I could be wrong.
18 It could have been 65. I'm not sure.
19 MR. JONES: Counsel, I don't know that I've
20 received anything from Medicaid -- or Medicare rather in
21 terms of any subro interest. I just want to get that
22 out there because I don't think I have anything.
23 Those rules that went into effect in July,
24 they want us to bring that up from the word go now. So
25 just to address that.

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1 Q BY MR. JONES: Franz, how would you describe
2 your vision in 2005?
3 A. Prior to the surgery?
4 Q. This is 2005.
5 A. 2005? I've always wore glasses. Every couple
6 of years, my glasses had to be a little stronger. I
7 went in for a routine eye exam in Hailey, and was told
8 that I was getting close to the time when I would need
9 cataract surgery. But my vision was good. I functioned
10 very well with glasses. I could read out of both eyes.
11 And I didn't know I had a problem other than the fact
12 that I needed glasses.
13 Q. As you sit here today, do you recall when this
14 visit was with your local eye care provider?
15 A. I think it was 2005.
16 Q. Who was that person?
17 A. Dr. Snapp.
18 Q. They're in Hailey?
19 A. In Hailey.
20 Q. So was that the first time you were told that
21 you had cataracts?
22 A. He said I was getting there.
23 Q. What information did he give you beyond that?
24 A. He said that -- sometime in the future, I
25 should see a cataract surgeon and see about the

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1 possibility of having the cataracts taken care of. But
2 he said there was no big hurry.
3 Q. Had you had any experience with any of your
4 family or friends, colleagues having had cataract
5 surgery before that time?
6 A. Cataract surgery had never entered my mind
7 until that time I heard about it. I had heard that it
8 was an easy surgery that was mostly successful. So once
9 Dr. Snapp told me about it, I started questioning some
10 people about it. And I researched it on-line and so
11 forth.
12 Q. What did you do on-line in terms of research?
13 A. Just looked up cataract surgery.
14 Q. When you looked up cataract surgery, did you
15 focus on the risks of the procedure? Was that at all
16 part of what you looked at?
17 A. I wasn't concerned about the risks because
18 they said it was 98 percent successful.
19 Q. You weren't concerned about the risks?
20 A. No.
21 Q. Why not?
22 A. Because it was 98 percent successful. If you
23 got to have it, you got to have it. And if you've got a
24 98 percent chance -- and I talked to -- I forget who it
25 was who had it, someone who had it, and said it was

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1 great and had greatly improved their vision, and they
2 didn't have to wear glasses anymore, et cetera.
3 Q. This was Internet research that you had done
4 at home?
5 A. Yes.
6 Q. So back in 2005 and before that, you had
7 Internet at your home?
8 A. Yes.
9 Q. You routinely used the Internet as a resource
10 tool?
11 A. Yes.
12 Q. If I understand you correctly that in looking
13 up cataract surgery, your research told you that it was
14 98 percent successful. And so although there was a
15 small chance of risks, you didn't feel that was
16 something that would impair your interest in having it
17 done; is that correct?
18 A. Yes, basically.
19 Q. Do you still have any of the sites or any
20 paperwork that you would have printed off from any of
21 those sites when you were researching cataract surgery?
22 A. I didn't print off anything. I Googled
23 cataract surgery, and I went on WebMD.
24 Q. On WebMD, though, if you went to those sites,
25 they talk about not only how the procedure is performed,

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11 (Pages 41 to 44)

1 but also the risks of the procedure; do they not?
2 A. Mostly how the procedure is performed and so
3 forth. I can't remember any risk they said, other than
4 to select a qualified physician.
5 Q. Anything else that you can remember about any
6 research you did on cataract surgery?
7 A. No.
8 Q. Other than researching it, apparently you said
9 you talked to a colleague who had had it done.
10 A. A friend, acquaintance.
11 Q. What else did you do before you took the next
12 step of actually seeking help from a cataract surgeon?
13 A. I had been recommended by -- to consult with a
14 cataract surgeon by Dr. Snapp at my leisure. I decided
15 to do it sooner rather than later. So I called the eye
16 center in Boise and went down for an interview.
17 Q. Why did you decide to have it done sooner
18 rather than later?
19 A. Because it was 98 percent successful and why
20 wait?
21 Q. I thought a couple minutes ago, you said that
22 you still had good vision as far as you were concerned,
23 and you could see, and that Dr. Snapp told you there was
24 no hurry.
25 A. That's correct.

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1 Q. But if you could see and there was no hurry,
2 why would you want to undergo surgery?
3 A. Well, he said that I was getting close and
4 that I should consider it.
5 MR. WHITEHEAD: Object to the form.
6 Q BY MR. JONES: Did you appreciate that your
7 vision was worsening in 2005?
8 A. Not really, because glasses took care of the
9 situation.
10 Q. Were you able to see at night when you would
11 drive?
12 A. Yes.
13 Q. Was your vision such in 2005 that it impaired
14 any activity that you did normally?
15 A. Not impaired, no.
16 Q. How about impact?
17 A. No.
18 Q. So if I understand your testimony, Dr. Snapp
19 had indicated to you that sooner or later you need to go
20 see a cataract surgeon. You had done research. And
21 your research on-line and from your colleagues indicated
22 that cataract surgery was 98 percent successful. And
23 you had no impairment of your vision at that time; is
24 that correct?
25 A. I wore glasses.

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1 Q. Besides wearing glasses.
2 A. Yeah. And the glasses were getting -- the
3 prescription was getting stronger every year.
4 Q. Was it your understanding that if you just
5 continued to get a stronger prescription, that that
6 would resolve the need to have cataract surgery?
7 A. No. Well, I took Dr. Snapp's advice. He said
8 I would need cataract surgery.
9 Q. How is it that you came to contact the
10 facility in Boise, The Eye Associates?
11 A. Well, there's none in Sun Valley. Nobody does
12 cataract surgery there. So the closest one was -- that
13 I knew of was Boise.
14 Q. How did you know of The Eye Associates?
15 A. Somebody in a conversation said they had gone
16 to The Eye Associates and had cataract surgery and it
17 was -- they were fine with it.
18 Q. Did Dr. Snapp make any suggestions to you for
19 cataract surgeons?
20 A. He said there was one individual in Twin that
21 did it. And the other alternative was to go to Boise.
22 And he said there were several in Boise.
23 Q. Did he give you the name of the person in
24 Twin?
25 A. I don't believe so.

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1 Q. So did you do anything to explore finding a
2 cataract surgeon in Twin Falls?
3 A. No.
4 Q. Your first choice in your mind was to go to
5 Boise?
6 A. Yes.
7 Q. Based on what somebody told you whose name you
8 can't remember, you elected to contact The Eye
9 Associates?
10 A. Yes. That's the only one I knew.
11 Q. So prior to contacting The Eye Associates in
12 2005, had you ever had any contact with anybody from
13 that office?
14 A. No.
15 Q. So kind of walk me through what you did next.
16 You indicated that you contacted somebody with The Eye
17 Associates and set up an appointment, correct?
18 A. Yes.
19 Q. Did you ask to see any specific physician?
20 A. Not as I recall.
21 Q. Do you know how it came to be that you saw
22 Dr. Pressman?
23 A. I don't.
24 Q. Do you remember when that first visit was?
25 A. It was in October of 2006. 2005. Either 2005

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12 (Pages 45 to 48)

1 or 2006.
2 Q. Do you have an independent memory as you sit
3 here today of that visit?
4 A. Yes.
5 Q. Tell me what you can recall about that visit.
6 A. I was introduced to Dr. Pressman. He did a
7 cursory examination.
8 Q. Why do you say cursory?
9 A. Well, he didn't go into any great depth. He
10 looked at the eye under the instrument and confirmed
11 Dr. Snapp's diagnosis. Then they put me in a room to watch
12 a movie, and then said, "When you think you want to go
13 ahead, call us."
14 Q. I'm still stuck on your use of the word
15 "cursory." You're saying he examined your eyes?
16 A. Yes.
17 Q. Is there something that he didn't do that you
18 thought he should have?
19 A. No. He knows -- I presumed he knew his
20 business. When I said cursory, it wasn't as thorough an
21 examination as Dr. Snapp had given.
22 Q. What was different about it?
23 A. The time spent and so forth.
24 Q. When you left Dr. Pressman's office on this
25 first visit, did you have any questions?

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1 A. No. The movie answered most of the questions.
2 Q. Was your wife with you on that day?
3 A. She -- I don't think so. She didn't come into
4 the office with me.
5 Q. Did anybody else come with you that day?
6 A. No.
7 Q. So you drive from your home in Sun Valley to
8 Boise for this appointment?
9 A. Yes.
10 Q. And do you remember completing any paperwork
11 when you came in?
12 A. Yes. I believe I filled out a medical
13 history.
14 Q. Did you fill it out accurately?
15 A. To the best of my knowledge.
16 Q. Do you remember talking to anybody at The Eye
17 Associates about that health history form?
18 A. No.
19 Q. Do you remember any part of your discussion
20 with Dr. Pressman other than him telling you when you
21 were ready, to come in to have the surgery?
22 A. I told him that I had been told by Dr. Snapp
23 that I was on the cusp of needing cataract surgery in my
24 right eye and eventually in my left eye. But he had
25 said that it wasn't something that I needed to do right

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1 away, but I should start considering it and looking into
2 it.
3 Q. Do you remember anything else that
4 Dr. Pressman told you on that visit?
5 A. No. Most of the information I got at that
6 time was from the movie.
7 Q. What do you remember about the movie?
8 A. They went through and told you how cataract
9 surgery was done and what the results would be. And it
10 was just a general informational video. It wasn't a
11 movie. It was a video.
12 Q. Do you remember the video talking about the
13 risks of cataract surgery?
14 A. If it did, I wasn't concerned.
15 Q. Why weren't you concerned?
16 A. Because they weren't -- they weren't --
17 cataract surgery, as I understood it, was a very simple
18 procedure done a lot of times and highly successful.
19 And my philosophy is if you're going to have to have
20 something done, you have to have it done, and do it
21 sooner than later and not worry about it. If I had to
22 have cancer surgery, it would be the same way.
23 Q. So if you saw this video again, would you
24 remember whether or not it was the video you watched, do
25 you think? Do you have that good a memory of it?

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1 A. Probably not. But I would recognize --
2 probably recognize certain things in there.
3 Q. Do you remember how long the video was?
4 A. Probably 15 minutes.
5 Q. So if I understand your memory of the first
6 visit, you came in; you completed a health history form;
7 you don't remember -- you have no memory of whether you
8 talked to anybody or anybody talked to you about it.
9 You just can't remember, correct?
10 A. I don't think they did, but I couldn't say
11 that for sure. I don't remember anybody going over the
12 health history form with me.
13 Q. Do you remember being examined by
14 Dr. Pressman?
15 A. Yes.
16 Q. You remember him talking to you about cataract
17 surgery?
18 A. Yes, briefly. But he said the video would
19 explain it more thoroughly to me; so to watch the video.
20 Q. Do you remember asking Dr. Pressman any
21 questions?
22 A. I asked him if he concurred with Dr. Snapp,
23 which he said he did. And I said, "How urgent is this?"
24 And he said, "It's not urgent. You can wait a while if
25 you want. See video. And then you can leave. And then

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13 (Pages 49 to 52)

1 when you think you want to go ahead, call us."
2 Q. So you understood that this was more or less a
3 procedure that didn't become necessary until you felt it
4 was necessary?
5 A. That's the -- where it was left with me, yes.
6 Q. So in other words, Dr. Pressman didn't
7 encourage you to have surgery on any specific timetable?
8 A. No. He just concurred with Dr. Snapp that I
9 should have it sometime in the near future.
10 Q. But left that date up to you?
11 A. Yes.
12 Q. Do you remember being provided with any
13 handouts that you took home with you from that first
14 visit?
15 A. I don't think there were any. They seemed to
16 rely on the video.
17 Q. My question was, do you remember if you took
18 any?
19 A. No.
20 Q. Or you were given anything?
21 A. No. I might have picked up a pamphlet when I
22 left the office. They had pamphlets there on cataract
23 surgery, that fold-over pamphlet.
24 Q. As you sit here today, you don't know whether
25 or not for sure you left The Eye Associates with any

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1 paperwork or documentation on cataract surgery?
2 A. Just a pamphlet.
3 Q. So you're saying you did take a pamphlet?
4 A. Yeah.
5 Q. So when you left his office, Dr. Pressman's
6 office, in October of 2005, you had been examined by
7 Dr. Pressman, you had watched a cataract video, and you
8 took a pamphlet on cataract surgery home with you?
9 A. Yes.
10 Q. Do you still have a copy of that pamphlet?
11 A. Probably not.
12 Q. Have you looked for it?
13 A. No.
14 Q. Maybe you can do that.
15 Franz, I'm handing you what's been marked as
16 Exhibit 3 to your deposition.
17 A. Okay.
18 Q. This is a copy of Dr. Pressman's chart of
19 which your counsel has a copy of.
20 MR. WHITEHEAD: Did I miss 2?
21 MR. JONES: Yeah. I've marked it. I haven't
22 got to it yet.
23 MR. WHITEHEAD: All right.
24 Q. BY MR. JONES: Franz, I'd like to focus your
25 attention on the first page of Exhibit 3.

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1 Do you recognize this document?
2 A. Yes.
3 Q. Is there anything on this page in your
4 handwriting?
5 A. Yes.
6 Q. What is in your handwriting?
7 A. Everything.
8 Q. Everything filled out on page 1 of Exhibit 3
9 is in your handwriting?
10 A. Yes.
11 Q. It says the date is 10/31 of '05?
12 A. Yes.
13 Q. Turn to the second page.
14 Is any of the writing on the second page in
15 your handwriting?
16 A. Yes.
17 Q. What is in your handwriting?
18 A. Apparently everything.
19 Q. Do you remember completing this document when
20 you came in on that day?
21 A. This refreshes my memory. Yes, I did complete
22 this document.
23 Q. Did you complete it accurately?
24 A. Yes, sir.
25 Q. Did you complete it honestly?

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1 A. Yes, sir.
2 Q. Did you have any questions about this document
3 when you completed it?
4 A. No.
5 Q. I'm looking at page 19 of Exhibit 3. If you
6 could flip back to that.
7 Do you see that page?
8 A. Yes.
9 Q. If you want to open up that clip so your
10 counsel can look over your shoulder.
11 A. Okay.
12 Q. I'll represent to you this is the chart note
13 for Dr. Pressman of his visit with you on that day.
14 A. Uh-huh.
15 Q. In the upper left-hand corner -- I'll just
16 read this to you and see if you agree or disagree with
17 what it says.
18 It says, "Complained of blurred vision,
19 flashers, floaters, glare, not sure which eye has
20 floaters, but has had them for some time. Patient not
21 happy with last eye exam. New glasses didn't improve
22 visual acuity. Was told should see a specialist."
23 Do you see where I read that?
24 A. Yeah.
25 Q. Did you disagree with any of that?

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14 (Pages 53 to 56)

000034

1 MR. WHITEHEAD: What's the date on that
2 record?
3 MR. JONES: 10/31 of '05.
4 THE WITNESS: This says 8/05.
5 Q BY MR. JONES: No. It says L-E-E's last eye
6 exam was 8 of '05. If you look in the right-hand
7 corner, it says 10/31 of '05.
8 Again, my question to you is just whether or
9 not you agree or disagree with what they wrote down your
10 subjective complaints to be when you came in on that
11 day?
12 A. I don't remember complaining about the last
13 eye exam. I was told that I should see a specialist.
14 My eyes were sensitive to sunlight.
15 Q. With respect to the blurred vision, the
16 flasher, the floaters, the glare, would you agree you
17 were complaining about that or not?
18 A. I don't remember complaining about the
19 flashers. I don't know what flashers are and floaters.
20 The vision was blurred without glasses.
21 Q. So are you saying you dispute some of the
22 information in here or you just don't recall?
23 A. I don't recall whether, at that time, had
24 floaters or flashers. Like I say, I'm not sure what
25 flashers are. Flashing lights.

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1 Q. Was that a problem that you were having at
2 that time; you would have problems with your eyes with
3 flashing lights?
4 A. Yes.
5 Q. And what does that mean to you? Would the
6 lights star out when you would see them?
7 A. No. For instance, in Seattle, we get a lot of
8 rain, and sometimes at night when you were driving,
9 flashing lights on the windshield.
10 Q. The glare on the windshield?
11 A. The glare, yeah.
12 Q. That would cause you some problems seeing?
13 A. Yes.
14 Q. Obviously, you agree with me that on the
15 health history form you completed that is Exhibit 3,
16 pages 1 and 2, there is no mention of Flomax.
17 Would you agree?
18 A. Yes.
19 Q. If you were to fill out this form again today,
20 would you fill it out any differently than you had on
21 that particular occasion?
22 A. I would, of course, put down that I'm taking
23 Flomax.
24 Q. So you would have -- if you could fill this
25 form out again, you would have written down on 10/31/05

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1 that you had taken Flomax?
2 A. No, I wouldn't have.
3 Q. Well, I didn't understand what you just said
4 then.
5 A. Well, this said, list all medications or eye
6 drops you were using. I wasn't using Flomax then.
7 Q. When did you first start using Flomax?
8 A. I went -- I think I started using Flomax in
9 December of '06. And I went off it after a couple of
10 months.
11 Q. So your testimony is, December of '06 is when
12 you first used Flomax?
13 A. As I recall.
14 MR. WHITEHEAD: You mean '05?
15 BETTY SUHADOLNIK: You mean '05.
16 THE WITNESS: Okay. '05.
17 Q BY MR. JONES: You don't recall which?
18 A. I recall that I wasn't using Flomax when I --
19 I would have no reason not to put Flomax down. I wasn't
20 using it when I filled out this history.
21 Q. So the transcript is clear, you're saying that
22 as of your appointment with Dr. Pressman on 10/31 of
23 '05, you had never taken Flomax in your life?
24 A. No.
25 Q. Is that correct?

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1 A. What's correct is I wasn't using it then.
2 Q. Had you ever taken it before?
3 A. You know, I can't recall. I can't recall the
4 date that it was first given to me.
5 Q. Who gave it to you?
6 A. Dr. Paris.
7 Q. So as you sit here today, you don't know
8 whether you had taken Flomax before you first went to
9 see Dr. Pressman on 10/31 of '05, but you know you
10 weren't taking it at that time?
11 A. No.
12 Q. Is that correct?
13 A. Yes.
14 Q. So in your mind then, you're saying that you
15 accurately completed the first two pages of Exhibit 3?
16 A. Yes.
17 Q. You had no other medications that you were
18 taking?
19 A. Not at that time.
20 Q. Both those two medications, the Lisinopril and
21 the Zocor, were prescribed by Dr. Paris?
22 A. Yes.
23 Q. So when you left on the 31st of October of
24 2005, what did you do next with respect to your vision?
25 A. After the initial exam?

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15 (Pages 57 to 60)

000035

1 Q. Yeah. What happened next?
2 A. I didn't do anything. I just waited.
3 Q. What happened during that time period that you
4 waited?
5 A. Nothing particularly.
6 Q. I mean, did the eye worsen?
7 A. It stayed about the same.
8 Q. So the vision in your right eye that you had
9 operated on eventually, you're saying it didn't worsen
10 at all?
11 A. Not perceptibly.
12 Q. What's the next thing that happened?
13 A. I decided to go ahead and call and have the
14 surgery.
15 Q. Why?
16 A. Both Dr. Snapp and Dr. Pressman said that I
17 would need it; and so I decided to get it done.
18 Q. Was it impairing -- was the quality of vision
19 in your right eye impairing your vision to the point
20 where you felt you were comfortable going ahead with
21 surgery?
22 A. No. My vision wasn't any more impaired than
23 it was when I first saw Dr. Snapp, but I was assured
24 that cataract surgery would improve it. It was going to
25 need to be done.

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1 Q. If you're saying that you had what you felt
2 was adequate vision in your right eye; that you could do
3 your daily activities and perform normally, your daily
4 functions, your work activities, your home activities,
5 your personal activities on a daily basis. And you're
6 saying that that hadn't worsened. I guess I don't
7 understand why you would have surgery done.
8 MR. WHITEHEAD: Is that a question?
9 MR. JONES: Yes, that is a question.
10 THE WITNESS: Let me put an analogy to you.
11 If you have a bad hip, you can still get by. But if hip
12 surgery will improve it, why not have the hip surgery?
13 That was my attitude towards the cataract
14 surgery. I was so convinced by talking to people who
15 had had it, by the prognosis given by both Dr. Snapp and
16 Dr. Pressman, and my research, that I decided to have it
17 done because it was going to have to be done sometime in
18 the near future.
19 Q. BY MR. JONES: When you made the decision, it
20 sounds like you made this decide yourself to have
21 surgery, correct?
22 A. Yes.
23 Q. What did you do to put the ball into play, so
24 to speak?
25 A. I called The Eye Associates.

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1 Q. Do you remember when you called them?
2 A. Sometime prior to May, to the date of surgery.
3 Q. What did you tell them?
4 A. I told them that I had seen Dr. Pressman and
5 that he had examined me and so forth, and he told me to
6 call when I wanted to have it done.
7 Q. What did they tell you?
8 A. They said, "Fine. We'll schedule it."
9 Q. Do you remember who you talked to?
10 A. A lady.
11 Q. Any more than that?
12 A. (No audible response.)
13 Q. What happened next?
14 A. They scheduled me for the surgery, scheduled
15 me to see them the day before. And I saw him briefly
16 the day before, and then the next day had the surgery.
17 Q. Did you do anything -- did you see Dr. Paris
18 at any point in time before you showed up for surgery?
19 A. Dr. Pressman requested that Dr. Paris do a
20 pre-op exam. And I saw him on approximately the third
21 or fourth week in May.
22 Q. How did it come to be that you showed up at
23 Dr. Paris' office? How did you find out about it?
24 A. I believe when they -- when they -- when I
25 called to make the appointment for the surgery, as I

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1 recall, they said, "You should go to your regular
2 physician and have an exam and clear yourself for the
3 surgery."
4 Q. Did they tell you anything about the scope of
5 the exam?
6 A. No. They left it up to -- I presume they were
7 going to contact the physician.
8 Q. So you weren't sent any paperwork that you
9 needed to take to your doctor?
10 A. Not that I recall.
11 Q. How did it come to be that you went to see
12 Dr. Paris?
13 A. He was my physician.
14 Q. Did you call and schedule something, or did
15 his office call you?
16 A. I can't remember. But my sole purpose in
17 seeing him at that time was in preparation for the
18 surgery by Dr. Pressman.
19 Q. Do you remember your visit with Dr. Paris?
20 A. Not clearly.
21 Q. Do you have any memory of it at all?
22 A. I remember I went.
23 Q. Beyond the fact that you went, do you remember
24 anything that was said or anything that was done?
25 A. No. I've reviewed the exam.

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16 (Pages 61 to 64)

1 Q. Does that help refresh your recollection of
2 what happened?
3 A. Yes. It was a routine -- he routinely checked
4 me, checked my blood pressure, and the things that
5 doctors do: Weight, blood pressure, heartbeat,
6 et cetera.
7 Q. But as you sit here, you don't recall him
8 doing that to you that day?
9 A. My recollection was enhanced by reading the
10 report. I see Dr. Paris probably twice a year. So over
11 a period of five years, the visits get intermingled.
12 Q. Between the time of October 2005 and May of
13 '06, if I understand your testimony correctly, your
14 vision didn't change such that it impaired your daily
15 function; is that correct?
16 A. As I -- my visit -- my visit -- my decision to
17 call for surgery was not based on anything new that had
18 happened. It was based on information that had been
19 given to me.
20 Q. Just your understanding that it had to be done
21 sooner or later?
22 A. Yes.
23 Q. Did you see any other health care providers
24 about your vision between October 2005 and when you went
25 to see Dr. Pressman in May of '06?

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1 A. No.
2 Q. Dr. Paris, he's still your primary care
3 physician?
4 A. Yes.
5 Q. Other than Dr. Snapp, Dr. Pressman, and the
6 folks at The Eye Associates, who else have you seen for
7 anything associated with care of your eyes in the last
8 ten years?
9 A. I -- of course -- well, let's see. I came
10 here in -- I moved to Idaho -- it's been ten years. I
11 think before Dr. Snapp, I may have seen somebody at
12 Costco to get new glasses and so forth, but I don't
13 remember who that was. But those were routine yearly
14 eye exams.
15 Q. Let's go forward from the time of the surgery
16 up until today.
17 A. From the time of the surgery up until today, I
18 saw Dr. Kent, who pinch hit for Dr. Pressman. Then I
19 saw Dr. Harf, who is a retinologist in, I think, Nampa
20 or someplace. Then I've seen Dr. Teske at the Moran Eye
21 Center and Dr. Crandall at the Moran Eye Center.
22 Q. Any other physicians that you've seen that you
23 can recall?
24 A. No.
25 Q. When was the last time you saw Teske or

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1 Crandall?
2 A. I saw Crandall for the -- last -- this past
3 April.
4 Q. April of '09?
5 A. Yes.
6 Q. What happened on that occasion?
7 A. That was the follow-up to a redo of the
8 cataract surgery that Dr. Pressman had done.
9 Q. What happened at that follow-up?
10 A. He said that he had done everything he could
11 for me, and that I should wait a few months and then
12 possibly see Dr. Teske again.
13 Q. Have you got an appointment scheduled with
14 Dr. Teske?
15 A. No.
16 Q. Do you plan to see him sometime in the next
17 few months?
18 A. Yes.
19 Q. So you've told me what you can recall about
20 your preoperative examination by Dr. Paris, correct?
21 A. Yes.
22 Q. What happened after that, as I understand it,
23 is you said you came the day before surgery --
24 A. Yes.
25 Q. -- to Boise, correct?

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1 A. Yes.
2 Q. Were you staying in a hotel or something?
3 A. Yes.
4 Q. By the way, did anyone go with you to your
5 appointment with Dr. Paris for preoperative
6 authorization?
7 A. No.
8 Q. Did anybody come with you to Boise?
9 A. My wife.
10 Q. So your wife Betty, who is in the room, did
11 she come with you to your appointment on the 30th of
12 May?
13 A. She waited in the car.
14 Q. So she was not present for any of the
15 conversations?
16 A. No.
17 Q. Tell me what you can recall happening the day
18 before the surgery when you went to Dr. Pressman's
19 office.
20 A. You know, I really can't recall anything
21 except that they asked me to come in and check in with
22 them the day before. They would give me information on
23 the time that I was scheduled the next day and so forth.
24 Q. Beyond that, you don't have any memory of what
25 happened?

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17 (Pages 65 to 68)

1 A. No. It was very brief.
2 Q. Do you remember being seen by Dr. Pressman?
3 A. I don't recall being seen by Dr. Pressman on
4 that day.
5 Q. Do you remember signing any forms?
6 A. On that day?
7 Q. Yes.
8 A. No. I remember signing them the next day when
9 I went to the surgery center.
10 MR. WHITEHEAD: It's 12:00. Can we take a
11 quick break? It takes two minutes.
12 MR. JONES: Sure.
13 (A recess was taken.)
14 Q. BY MR. JONES: After a short break, Franz, are
15 you in a position where you're able to continue the
16 deposition?
17 A. Yes.
18 Q. If you would turn to page 43 and 44 of
19 Exhibit 3. First of all, I'll let you look at the
20 document. It's two pages.
21 A. Uh-huh.
22 Q. Have you had a chance to look at it?
23 A. Uh-huh.
24 Q. Is your answer yes?
25 A. Yes.

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1 Q. Other than the page that's Bates stamped 44,
2 is that your signature?
3 A. Yes.
4 Q. The date is May 30th of 2006?
5 A. Yes.
6 Q. That's the day before your surgery?
7 A. Yes.
8 Q. Do you have a recollection of signing this
9 document?
10 A. I have a recollection of signing a release
11 document, yes.
12 Q. This isn't a release. It's an informed
13 consent document.
14 A. Okay.
15 Q. Do you remember signing it?
16 A. Yes.
17 Q. Do you remember anything else associated with
18 how it came to be that you signed that document on that
19 day?
20 A. No.
21 Q. That's all I had for that particular document.
22 Thank you.
23 I want to talk to you for a minute, Franz,
24 about this medication, Flomax, in a little bit more
25 detail.

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1 What do you understand that medication to be?
2 A. It's a medication which relaxes the muscles
3 around the bladder, which enables an elderly man like
4 myself to empty his bladder.
5 Q. Did you have that understanding when you first
6 started taking the medication?
7 A. The understanding was it may or may not help
8 me, but give it a try.
9 Q. You said that it was Dr. Paris who put you on
10 this medication?
11 A. Yes.
12 Q. Do you remember having any discussion with
13 Dr. Paris about Flomax before you started taking it?
14 A. Only what it would do. What it might do.
15 Q. So you don't recall Dr. Paris telling you
16 anything about the drug Flomax except that it might help
17 relax the muscles in your bladder?
18 A. Yes.
19 Q. Nothing else that you can recall him sharing
20 with you about Flomax?
21 A. Oh, he said to read the -- to read the
22 information pamphlet that the pharmacist would give me.
23 Q. Did you do that?
24 A. Yes.
25 Q. Do you still have that document?

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1 A. Probably not.
2 Q. Describe this pamphlet that you received from
3 the pharmacist on Flomax when you first filled it.
4 A. It was the usual type of information which
5 included some of the side effects and so forth.
6 Q. Did you read that document?
7 A. Yes.
8 Q. Was it a handout that came from the pharmacy,
9 or was it something that was prepared by the drug
10 company that the pharmacist handed out?
11 A. I believe it was a handout that you get with
12 every prescription. My pharmacist always includes a
13 information pamphlet in there. Then I also researched
14 it on-line.
15 Q. Before you started taking it?
16 A. Yes.
17 Q. So I'll ask this question again just so I'm
18 sure we're on the same page.
19 Do you recall when you first started taking
20 Flomax, when that was?
21 A. The exact date?
22 Q. Month even.
23 A. I think I started taking it in December of
24 2006.
25 BETTY SUHADOLNIK: 2005.

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18 (Pages 69 to 72)

1 THE WITNESS: '05? '05.
2 Q. BY MR. JONES: Your wife is helping you to
3 answer that question, which, for this purpose, is fine.
4 So if you started taking it for the first time
5 in December of 2005, if I understand your testimony,
6 Franz, you're telling me that Dr. Paris told you that it
7 may help you to relax the muscles around your bladder,
8 correct?
9 A. Yes.
10 Q. Then you also received information on Flomax
11 from your pharmacist, correct?
12 A. Yes.
13 Q. And the information you received from the
14 pharmacist talked about the risks of the medication,
15 correct?
16 A. Possible side effects.
17 Q. And do you recall any of those side effects?
18 A. Yes.
19 Q. What do you recall about that?
20 A. There was three side effects listed that were
21 of concern: One was dizziness, runny nose, and drying
22 up of semen.
23 Q. I'm curious why several years later, you
24 recall what those three were.
25 A. Because it was actually the first drug that

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1 I've ever taken that I had all the side effects.
2 Q. Tell me what those side effects were again.
3 A. Dizziness or faintness, runny nose, and drying
4 of semen.
5 Q. So it's your memory that when you read the
6 documentation on Flomax from your pharmacist, that it
7 warned of these three side effects, and you personally
8 experienced all three of them?
9 A. Yes.
10 Q. Did you report to Dr. Paris that you had
11 experienced any of those?
12 A. Yes.
13 Q. What did he tell you?
14 A. He said that I could stop taking it because,
15 there again, I could get by without it.
16 Q. So what did you decide to do?
17 A. I quit taking it.
18 Q. How long did you take it before you decided to
19 stop taking it?
20 A. Maybe a month.
21 Q. So it's your memory then that you took the
22 drug Flomax for about one month?
23 A. Uh-huh.
24 Q. Is that correct?
25 A. Yes.

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1 Q. In December of '05?
2 A. Yes.
3 Q. Because you had experienced all of these side
4 effects -- the dizziness, the faintness, the runny nose,
5 the drying of your semen -- in consultation with
6 Dr. Paris, you decided to stop taking it?
7 A. I don't know whether I consulted with him or
8 not. I may have just done it on my own, because he had
9 indicated to me that it was a drug I could try if I
10 wanted to.
11 Q. Did he give you samples in his office?
12 A. No.
13 Q. So he actually gave you a prescription?
14 A. As I recall.
15 Q. You went to your pharmacy. You filled it?
16 A. Yes.
17 Q. That's how you got the paperwork that you were
18 talking about?
19 A. Yes.
20 Q. I would ask you to look to see if you still
21 have that paperwork at home. Can you do that for us?
22 A. Yes.
23 Q. If you find it, you can give it to your
24 attorney.
25 A. Uh-huh.

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1 Q. What pharmacy was this?
2 A. I believe it was -- were we going to
3 Albertsons then? I think it was Albertsons.
4 Q. The Albertsons in Hailey?
5 A. Yeah.
6 Q. So we were talking about things that you did
7 to educate yourself about Flomax. And so you had this
8 conversation with Dr. Paris. You reviewed the pharmacy
9 materials that talked about the side effects of the
10 drug.
11 Then you said you did some Internet research,
12 correct?
13 A. Yes.
14 Q. What Internet research did you do?
15 A. Just Googled it up or went on WebMD, one or
16 the other.
17 Q. So in December of 2005, you did Internet
18 searches for the drug Flomax?
19 A. Yes.
20 Q. What specifically were you looking for?
21 A. I was looking for the side effects to confirm
22 what the -- I always check the side effects on any drug
23 I take, and to confirm what was in the literature that
24 was given to me by the pharmacist.
25 Q. In December of 2005, did you find anything in

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19 (Pages 73 to 76)

1 your Internet searches that addressed the side effects
2 of the drug Flomax?
3 A. Yes.
4 Q. What did you find?
5 A. The same thing that was in the literature from
6 the pharmacist: Dizziness, runny nose, and semen.
7 Q. So your memory is that you did two things.
8 You Googled it, the drug Flomax. Did you enter, for the
9 search term, Flomax side effects?
10 A. No. Just Flomax. If you go on the Internet
11 and put in Flomax, they'll give you all the information.
12 Or any drug, they'll give you all the information.
13 Q. I just want to make sure I understand the
14 nature of the research that you did on Flomax in
15 December of 2005.
16 You're saying that you Googled it and that you
17 went to WebMD?
18 A. Yes. I think that was in December of 2005. I
19 can't remember if it actually was in December of 2005.
20 Q. Would it have been before you started taking
21 the drug?
22 A. It might have been.
23 Q. I thought you said a minute ago that you
24 always find out what the side effects are of a drug
25 before you start taking it.

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1 A. I do.
2 Q. As you sit here, isn't it a fair conclusion
3 that you would have done that research that you're
4 talking about?
5 A. I had the information the pharmacist gave me
6 before I started taking it, see. So what I may have
7 done is gone on there once I started getting the side
8 effects to confirm that those were side effects.
9 Q. Your research may have actually been in
10 January or February of 2006?
11 A. Could have been. But I always read the
12 pamphlet that the pharmacist gives me.
13 Q. So you know for sure you did that in December
14 of 2005?
15 A. I did it when I had the prescription filled.
16 Q. Time frame-wise with respect to this Flomax,
17 you don't remember Dr. Paris, for example, having any
18 discussion with you about what this drug may or may not
19 do with respect to your eyes?
20 A. No.
21 Q. Do you remember ever seeing any commercials on
22 T.V. for Flomax?
23 A. Not at that time, no.
24 Q. At some point later?
25 A. Say that again.

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1 Q. At some point later, did you see a commercial
2 on T.V. that had to do with Flomax and whether it
3 impacted your eyes?
4 A. No. The first time I ever heard that Flomax
5 impacted my eyes was when Dr. Pressman told me.
6 Q. Maybe you didn't understand my question.
7 Even up until today, have you ever seen a
8 commercial on T.V. that talks about --
9 A. Yes.
10 Q. Let me finish my question.
11 Any time up to today, have you seen a
12 commercial on television that talks about the impact
13 that Flomax can or might have on your vision or your
14 eyes?
15 A. Yes. Several months or maybe even a year
16 after I originally took Flomax, the drug company put a
17 warning on their commercials to tell your doctor, your
18 eye doctor, if you're taking Flomax.
19 Q. Your understanding is this occurred when?
20 A. The first time I saw it was after I had
21 visited the Moran Eye Center.
22 Q. So your first memory of seeing anything in the
23 news or the commercials for Flomax about any issues
24 associated with your eye care and that drug was sometime
25 at least several months after Dr. Pressman's surgery; is

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1 that correct?
2 A. Yes.
3 MR. WHITEHEAD: Object to the form.
4 Q. BY MR. JONES: Your answer was yes?
5 A. Yes.
6 Q. When you were doing your Internet research
7 that you've talked about, did you ever come across any
8 F.D.A. documents?
9 A. Not to my knowledge.
10 Q. Do you know what a Dear Doctor letter is from
11 the F.D.A.?
12 A. I could presume.
13 Q. Well, in your 30 years as a dentist, did you
14 ever receive information from the F.D.A. about concerns
15 about any drugs?
16 A. Not to my knowledge.
17 Q. Did your prescription for Flomax that you've
18 talked about having in December of 2005, was that always
19 the same strength, the same dosage?
20 A. Yes, the same dosage. But when I went back on
21 it, I took it every third day.
22 Q. Instead of every day?
23 A. (No audible response.)
24 Q. Is your answer yes?
25 A. Yes.

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1 Q. All right. When you were first given the
2 prescription, you were told to take, as I reviewed the
3 records, .4 milligrams?
4 A. I believe that's it. I don't remember.
5 Q. So you were taking that dosage on a daily
6 basis?
7 A. For a short period of time.
8 Q. You encountered these problems, and you
9 decided on your own to stop taking the drug?
10 A. Yes.
11 Q. At some point, you decided to start taking it
12 again?
13 A. Yes.
14 Q. When was that?
15 A. It was after my cataract surgery.
16 Q. The one Dr. Pressman did?
17 A. The one Dr. Pressman did.
18 And I subsequently went to the Moran Eye
19 Center and said -- I was told by the previous surgeon
20 that Flomax was the reason that he had problems. And
21 they said, "Don't worry, we will be able to handle
22 that." And I said, "I'm off it. Can I -- should I stay
23 off it?" They said, "No, if you've taken it once, the
24 problem is there."
25 Q. So are you able to put a date, a month,

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1 roughly, when you started taking Flomax again?
2 A. Let's see. I finished with Dr. Kent and saw
3 him in May, finished with him in July, saw Dr. Harf. I
4 think I saw -- I went to the Moran Eye Center in
5 September. And after consulting with them and being
6 assured that it wouldn't matter whether I took it or not
7 as far as they were concerned, I started taking it
8 again.
9 Q. So your memory of the events then with respect
10 to this drug Flomax are that you took it for
11 approximately a month in the December/January 2005 to
12 '06 time frame, correct?
13 A. It may have been more. It may have been less.
14 Q. But that's your best estimate right now?
15 A. Yes.
16 Q. So even though you had a prescription for
17 Flomax, you didn't keep filling those; you just decided
18 to stop taking it, correct?
19 A. Yes.
20 Q. Did you call Dr. Paris' office anytime between
21 January of '06 and when you had your cataract surgery
22 with Dr. Pressman in May of '06 to tell him that you
23 weren't taking Flomax anymore?
24 A. I don't remember a specific time, but I told
25 him that I was going to go off it because of the side

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1 effects.
2 Q. When you went to see him for your preoperative
3 authorization in May of 2006, did you tell him that you
4 were not taking the Flomax?
5 A. I can't remember at that specific appointment
6 whether I did or not.
7 Q. But at any rate, you hadn't been taking it for
8 several months prior to that appointment, correct?
9 A. I had quit taking it by the time I had that
10 appointment.
11 Q. That's what I'm getting at. You stopped
12 taking it months before your May 2006 appointment with
13 Dr. Paris, correct?
14 A. I don't know if it was months or not. I can't
15 tell you the exact length of time I took it.
16 Q. Was it at least a month?
17 A. Probably.
18 Q. Was it two months?
19 A. I'm not sure.
20 Q. Would your day planner at home tell you when
21 you stopped taking that drug?
22 A. No.
23 Q. You didn't write it down?
24 A. No.
25 Q. Do you still have the prescription at home

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1 that had that original pill bottle for the Flomax?
2 A. No. When we have prescriptions filled, we
3 take the original pill bottle back, and they give us a
4 new one.
5 Q. You recycle it?
6 A. Yeah.
7 Q. So the pharmacy at Albertsons in Hailey was
8 where you think you filled that prescription in December
9 of 2005 for Flomax?
10 A. I think so, yes.
11 Q. Was that the only pharmacy that you went to
12 for your Flomax prescriptions?
13 A. I believe so, because we were on the
14 prescription plan, and the pharmacy in Ketchum does not
15 accept our prescription plan.
16 Q. So when you went to see Dr. Paris, you don't
17 recall if you told him you weren't taking Flomax any
18 longer. But at any rate, you weren't taking it at that
19 time; so there wouldn't have been any reason for him to
20 prescribe you more Flomax; is that correct?
21 MR. WHITEHEAD: Object to the form.
22 THE WITNESS: I told him -- as I recall, I
23 told him I was going off it because of the side effects
24 that I was having. And the side effects were worse at
25 that time than the bladder problem. And he said, quote,

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21 (Pages 81 to 84)

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1 "Fine, you can use your own judgment." He trusted me
2 probably more than he would -- to use my own judgment
3 more than many patients because of my background. And
4 he said, "When you feel that you need it again, start
5 taking it again."

6 Q. BY MR. JONES: When you say he trusted you
7 more because of your background, you're talking about
8 your background in medicine as a dentist?

9 A. Yes.

10 Q. So Dr. Paris felt more comfortable with you
11 than, say, the average lay patient that might be a ditch
12 digger because you know more about medicine?

13 A. I feel that he probably does because there's
14 another prescription drug that he put me on, and I cut
15 it in half.

16 Q. On your own?

17 A. On my own.

18 Q. What drug was that?

19 A. Lisinopril.

20 Q. So Dr. Paris prescribed the Lisinopril at X
21 dosage and you, on your own, based on your knowledge in
22 pharmacology and your experience with the drug, you
23 personally decided to cut that in half?

24 A. I monitored my blood pressure, and the blood
25 pressure got too low.

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1 Q. So without going back to see him, you went
2 ahead and made that change on your own?

3 A. Yes.

4 Q. You felt comfortable doing so?

5 A. Yes.

6 Q. So when you went to see Dr. Paris in May of
7 2006 for your preoperative clearance, do you recall the
8 subject of Flomax ever even coming up?

9 A. No.

10 Q. You don't recall or you don't think it did?

11 A. To my best knowledge, it didn't. He said --
12 as I recall, he said that he needed to file pre-op
13 information with Dr. Pressman and he would do so.

14 Q. Did he tell you how he was going to go about
15 doing that?

16 A. I think he said because it was getting quite
17 close to the date -- that -- and I said, "Are they going
18 to have this information in time so they can go ahead
19 with the surgery?" And he said, "Yes."

20 Q. Beyond that, he didn't tell you how he was
21 going to go about reporting it?

22 A. No. He just assured me that they would have
23 it.

24 Q. Did he tell you, Dr. Paris, during that
25 preoperative visit that you would be okay to go through

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1 with the surgery?

2 A. He said he saw nothing, but that was up to the
3 judgment of Dr. Paris -- or Dr. Pressman. All he did
4 was report his findings. Because I remember asking, "Am
5 I going to be okay for the surgery?" He said, "They
6 have to make that decision. But as far as I'm
7 concerned, you are."

8 Q. Would you turn to page 27 of Exhibit 3. Do
9 you have that in front of you?

10 A. Yes.

11 Q. You see there in the middle of the page where
12 it says Plan?

13 A. Plan?

14 Q. Down a little further.

15 A. Oh, yeah.

16 Q. Do you see the second line where it says,
17 "Patient is medically cleared for surgery as planned by
18 Dr. Pressman"?

19 A. Uh-huh.

20 Q. Is your answer yes? Do you see that?

21 A. Ask the question again.

22 Q. Did I read that correctly?

23 A. Read it again.

24 Q. "Patient is medically cleared for surgery as
25 planned by Dr. Pressman."

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1 A. Yes.

2 Q. Does that help refresh your recollection as to
3 whether or not Dr. Paris told you that day you were good
4 for surgery?

5 A. There again, he said as far as he was
6 concerned, I was. But it was up to -- the decision was
7 up to Dr. Pressman.

8 Q. Again, the whole purpose of this visit was
9 just for a pre-op exam?

10 A. As I understand.

11 Q. You didn't have any other medical needs that
12 you discussed with him that day, did you?

13 A. No. No.

14 Q. Now, since Dr. Paris is the prescribing doctor
15 for your Flomax, have you at any point, even up to
16 today, had a conversation with him about Flomax and your
17 eyes?

18 A. At the last time I saw him, which was a year
19 ago November, I told him of the problem that had
20 occurred with my eyes; and that the doctor who did the
21 eye surgery blamed it on the fact that I was taking
22 Flomax.

23 Q. What did he tell you?

24 A. He said he had heard recently that Flomax
25 could have an adverse effect on the tissues of the eye.

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22 (Pages 85 to 88)

1 Q. So in 2008, November of 2008, you're telling
2 me that Dr. Paris told you that he had recently heard
3 that Flomax could impact the tissues in the eye?
4 A. When I told him that, he said he had heard
5 that too.
6 Q. That he had recently heard that?
7 A. Yes.
8 Q. Did he tell you when recently?
9 A. No.
10 Q. Did he say anything more to you about Flomax
11 at that time?
12 A. He said, was it helping me any? And I said
13 "Yes, but I'm just taking it every three days."
14 Q. When he prescribed you the Flomax, did he ever
15 change the prescription to once every three days, or was
16 that just something you did on your own?
17 A. I did it on my own. And I called him and said
18 I was going to do so.
19 Q. So it's your understanding then that he said
20 that's okay?
21 A. He said, "See how it works."
22 Q. Have you ever done any more research into the
23 drug Flomax in terms of how it affects the eye?
24 A. Only with the information that Dr. Paris gave
25 me -- or Dr. Pressman gave me. And then I discussed it

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1 with Dr. Crandall.
2 Q. What information did Dr. Pressman give you?
3 A. He walked into the room, said, "We had a
4 problem. And by the way, are you taking Flomax?"
5 Q. Was that the day of surgery, the day after
6 surgery? When was that?
7 A. That was when I was in the recovery room.
8 Q. What specifically did he give you?
9 A. What did he give me?
10 Q. Yeah. I thought you said he gave a paper or
11 document of some kind.
12 A. No, not Dr. Pressman.
13 Q. So even now, up until today, other than your
14 discussion with Dr. Paris in November of 2008, he had
15 never given you any sort of warning or documentation
16 saying that "Hey, just so you know, Flomax might impact
17 your eyes"?
18 A. (No audible response.)
19 Q. Your answer is no?
20 A. No.
21 Q. After you experienced your complication in May
22 of 2006 during your surgery with Dr. Pressman, was it
23 not until November of 2008 that you reported that to
24 Dr. Paris or had he known before that?
25 A. I had no reason to report it with him until I

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1 went in for my examination again because it was an eye
2 problem and I had gone to the Moran Eye Center and
3 discussed it with them.

4 Q. Do you think Dr. Paris, before he put you on a
5 medication, should have warned you of the risks of the
6 drug?

7 A. I'm not sure he didn't. I was aware that
8 there were three main side effects. And I can't recall
9 whether I got those from Dr. Paris ahead of time or not,
10 but they were in the literature that the pharmacy gave
11 me, and it was on the Website.

12 Q. Was it your understanding that the literature
13 on the Website and the literature from the pharmacy
14 talking about dizziness, faintness, runny nose and
15 drying of semen meant that you would have problems with
16 the tissues in your eye?

17 A. No. There was no mention of that.

18 Q. My question is: Don't you think Dr. Paris
19 should have told you about that before putting you on
20 that drug?

21 MR. WHITEHEAD: Object to the form.

22 THE WITNESS: In my opinion, nobody knew about
23 that at that time. It wasn't widely known.

24 Q. BY MR. JONES: At what time?

25 A. At the time that Dr. Paris first prescribed

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1 the Flomax.

2 Q. So you're saying in December of 2005, it
3 wasn't widely known?

4 A. The advertisement, to my knowledge, was not on
5 T.V.

6 Q. When is your understanding that it became
7 widely known?

8 MR. WHITEHEAD: Object to the form.

9 THE WITNESS: Should I answer?

10 MR. WHITEHEAD: Yeah.

11 THE WITNESS: When I was consulted with it at
12 the Moran Eye Center, they asked me in the preoperative
13 exam there, if I had ever taken Flomax. And I said,
14 "Yes. That's what apparently was the reason that the
15 previous surgeon claims he had the problem."

16 And they said we have just recently discovered
17 that. Dr. Crandall has done the research on that. And
18 Dr. Crandall is one of the people responsible for
19 requiring the drug maker to put that in their
20 disclaimers.

21 Q. BY MR. JONES: So in September of 2006 when
22 you went to see Dr. Crandall at the University of Utah
23 at the Moran Eye Center --

24 A. Yes.

25 Q. -- your memory is the folks told you that this

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23 (Pages 89 to 92)

1 association between Flomax and cataract surgery
2 complications had just come about?
3 A. No. I raised the questions because of what
4 Dr. Pressman said. And I said I was told by -- they
5 knew I was there for corrective surgery from what
6 Dr. Pressman had done. That was -- that's why I went to
7 the Moran Eye Center. And I raised the question of
8 Flomax. And they said "Yes, we're aware of the side
9 effects of Flomax on the eye, and we will be prepared to
10 handle that."
11 Q. I thought you said a moment ago that they had
12 told you that Dr. Crandall had just been doing research
13 on that issue.
14 A. They said Dr. Crandall was one of the people
15 that -- they said, "Dr. Crandall will be doing your
16 follow-up cataract surgery. And he was one of the
17 people responsible for compelling the drug company to
18 put that on there as a disclaimer."
19 Q. Did they give you any more information as to
20 how recently that issue had come up?
21 A. No. I was comfortable with them that they
22 would be able to -- I knew I was going to have to have
23 cataract surgery on the other eye; so I was very, very
24 cautious then. And I was convinced that they would be
25 able to handle the situation.

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1 Q. Let me ask you this: If Dr. Paris had told
2 you before you started taking Flomax in the December of
3 2005 that there might be some association -- we don't
4 know yet because it's brand new -- between taking this
5 Flomax and the impact it might have on one's eyes, would
6 that have led you to decide not to take it?
7 A. No. But I would have questioned the surgeon
8 and would have mentioned the Flomax.
9 Q. So that would have prompted you to bring that
10 up?
11 A. Yes.
12 Q. Well, if he said you have a slightly increased
13 risk because of the Flomax, but we don't know beyond
14 that because they still are trying to figure it out, are
15 you saying that you would have decided differently?
16 MR. WHITEHEAD: Object to the form.
17 THE WITNESS: I likely would have postponed
18 the cataract surgery.
19 Q. BY MR. JONES: Likely. So you're saying you
20 don't know for sure? I'm sorry?
21 A. I likely would have, yes, unless -- I didn't
22 postpone the second cataract surgery with Dr. Crandall
23 because he assured me that he could manage it. I felt
24 very confident in him. They were very aware of the
25 Flomax at the Moran Eye Center.

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1 Q. Because of Dr. Crandall's research on the
2 issue?
3 A. Yes.
4 Q. Did you ever talk with Dr. Crandall about
5 whether anybody in Idaho knew about this Flomax issue?
6 A. Physicians are rather hesitant to say much
7 negative about anybody else.
8 Q. My question to you was --
9 A. He did say there was no doubt that the problem
10 with my eye was as a result of the first cataract
11 surgery.
12 Q. Did Dr. Crandall indicate to you whether there
13 were any doctors in Idaho that knew anything about this
14 Flomax issue and whether it impacted cataract surgery?
15 A. Did he ask me if anybody knew?
16 Q. No. I'm asking you if he told you if anybody
17 in Idaho, any physicians in Idaho --
18 A. I told him that Dr. Pressman knew. That's as
19 far as it went.
20 Q. So he didn't tell you whether or not he talked
21 with any doctors in Idaho about this issue?
22 A. No. No.
23 Q. So I want to make sure I'm clear then.
24 Prior to your cataract surgery on May 31,
25 2006, is it your testimony that you hadn't been told by

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1 any health care provider that Flomax might impact your
2 cataract surgery?
3 A. The first time I heard it was from
4 Dr. Pressman after the surgery.
5 MR. JONES: This is a transition point where
6 I'm at now. Do you want to see if your lunch is here?
7 MR. WHITEHEAD: Sure. Let's take a short
8 break.
9 MR. JONES: Okay.
10 (A recess was taken.)
11 Q. BY MR. JONES: After a short break, we're back
12 on the record.
13 Franz, we were working our way chronologically
14 through the events.
15 You spent the night in the hotel the night
16 before the surgery by Dr. Pressman, correct?
17 A. Yes, sir.
18 Q. Do you have any memory of the day of the
19 surgery itself?
20 A. Yes.
21 Q. Do you remember what time you arrived at the
22 surgery center?
23 A. It was early, fairly early morning, around
24 maybe 8:30 or 9:00.
25 Q. Was your wife with you?

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24 (Pages 93 to 96)

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1 A. Yes.
2 Q. Was she in a position where she could see the
3 surgery?
4 A. No.
5 Q. So she waited in the waiting room?
6 A. Yes.
7 Q. Walk me through what you can remember from the
8 time you got there until the time of the surgery itself
9 when they took you in for surgery.
10 A. They gownned me up. I was laying on a
11 roll-away. It looked somewhat like an assembly line
12 because there were other patients lined up. I thought,
13 "Gee, how long am I going to be here?" Then there was
14 one or two gentlemen ahead of me.
15 And then they came to me and said they had
16 dilated. And they said, "The gentleman ahead of you is
17 not dilating; so we're taking you next."
18 I went into the surgery. They sedated me. I
19 fell asleep. And when I woke up, they were getting
20 ready to take me into the recovery room.
21 Q. So when you got to the surgery center, do you
22 remember filling out any paperwork?
23 A. I remember -- I remember, I think, signing a
24 release.
25 Q. I'll show you what's been marked as Exhibit 2

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1 to your deposition.
2 A. Okay.
3 Q. If you'll look at page 7 of that document.
4 MR. WHITEHEAD: What is it?
5 MR. JONES: Sorry, Counsel. Those are the
6 records you guys produced from the Laser Center.
7 MR. WHITEHEAD: Is that all the records from
8 the Laser Center?
9 MR. JONES: It's all the ones you guys
10 produced.
11 Q. BY MR. JONES: Franz, did you have a chance to
12 look at page 7 and 8?
13 A. Yes.
14 Q. Does that document on the bottom of page 8
15 bear your signature?
16 A. On mine, it's page 5. It goes 7 to 5.
17 Q. I'll just show it to you, this page here.
18 A. Just a second. Mine must be out of line.
19 Okay. Here is page 8.
20 Q. Look on the bottom right-hand corner. That's
21 the page number I'm referring to. Bottom right-hand
22 corner. See where it says page 8 right here?
23 A. Oh, I see. Mine are out of line.
24 Q. All right. Just so the transcript is clear,
25 looking at pages 7 and 8 of Exhibit 2 to your

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1 deposition, do those two pages represent the informed
2 consent document that you signed prior to surgery that
3 day?
4 A. It's my signature, yes.
5 MR. WHITEHEAD: You're referring to Bates
6 numbers, not the page numbers of the document.
7 MR. JONES: Correct, the Bates numbers.
8 Q. BY MR. JONES: Do you remember reading through
9 this document before you signed it?
10 A. Yes.
11 Q. Do you remember asking any questions
12 associated with this document?
13 A. I remember reading it, yes.
14 Q. Do you remember asking any questions
15 associated with it?
16 A. Not to my knowledge.
17 Q. Before you went into surgery on May 31, did
18 you have any other questions regarding the procedure
19 that had not been answered to your satisfaction?
20 A. None that I can think of.
21 Q. If you look at page 9 by the Bates number on
22 the bottom right-hand corner --
23 A. Uh-huh.
24 Q. Do you have that document in front of you,
25 page 9?

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1 A. Yes.
2 Q. It looks like this. Do you see, Franz, what I
3 have in my hand? Are we on the same page?
4 A. Yes.
5 Q. Do you remember signing that document, Consent
6 for Anesthesia?
7 A. It's my signature. I must have signed it.
8 Q. You don't dispute then those two documents
9 that I just showed you bear your signature?
10 A. No.
11 Q. If I asked you to describe the people you
12 talked to prior to surgery, would you be able to
13 describe any of them?
14 A. No. It was a female.
15 Q. Was that the first time you'd ever been to
16 that surgery center?
17 A. Yes.
18 Q. Do you recall if you talked to Dr. Pressman
19 before the surgery?
20 A. No, not until I was wheeled into the surgery.
21 And I think I said, "Hi."
22 Q. So you do remember seeing him before surgery?
23 A. I remember when I went in as he came up over
24 me, I saw him.
25 Q. Did you have an IV placed?

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25 (Pages 97 to 100)

000043

1 A. I don't know what they gave me.
 2 Q. You don't remember whether you got any
 3 injections of any kind?
 4 A. I think it was because they sedated me. And I
 5 don't remember taking anything orally; so it must have
 6 been.
 7 Q. Do you remember if there were any viewing
 8 windows in the surgery room?
 9 A. Not that I can recall.
 10 Q. Can you describe the surgery room for me?
 11 A. No.
 12 Q. Do you remember how many people were in the
 13 room when you were wheeled in before you were sedated?
 14 A. I don't. You're laying flat out and you don't
 15 see much.
 16 Q. So you indicated that they wheeled you in;
 17 they sedated you; and you then woke up after the
 18 surgery; is that correct?
 19 A. Yes.
 20 Q. What's your first memory after the surgery?
 21 A. My first memory after the surgery? I realized
 22 it was done. I was happy it was done. And they said,
 23 "We're going to take you in and give you a piece of
 24 toast and a glass of juice."
 25 Q. Do you remember if your eye had a patch on it?

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1 A. I think it did, because I went back the next
 2 morning and they took it off.
 3 Q. Do you remember feeling any pain associated
 4 with your eye when you woke up from surgery?
 5 A. No.
 6 Q. At some point you indicated you had some
 7 conversation with Dr. Pressman after the surgery?
 8 A. Yes.
 9 Q. Was that the day of surgery?
 10 A. That was the day of surgery.
 11 Q. What do you remember happening associated with
 12 that?
 13 A. I was in the recovery room, drinking some
 14 juice. They brought Betty in. And Dr. Pressman came in
 15 and he said, "We have a problem. I wasn't able to
 16 complete the cataract surgery under the normal manner.
 17 I had to revert to the old type lens and so forth. Have
 18 you taken -- have you ever taken Flomax?" I said "Yes,
 19 I have." He said, "I think that's our problem." And he
 20 said, "But it will be okay. It will get better."
 21 Q. Anything else that he told you?
 22 A. He said, "I noticed some heavy floaters," and
 23 my vision would be blurred for a few day.
 24 Q. Anything else that he told you on that day?
 25 A. Not that I can recall.

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1 Q. What did you tell him other than, yes, you had
 2 taken Flomax?
 3 A. Nothing.
 4 Q. You said your wife was present for that
 5 conversation?
 6 A. Yes.
 7 Q. Did your wife say anything?
 8 THE WITNESS: Did you say anything?
 9 Q. BY MR. JONES: She can't answer.
 10 A. She might have said, "Oh, shit."
 11 Q. Other than that?
 12 A. Nothing that I can recall.
 13 MR. WHITEHEAD: Terry, lunch is here. Can we
 14 take our ten minutes and get back to it?
 15 MR. JONES: Can I finish this little line of
 16 questioning?
 17 MR. WHITEHEAD: You bet. Go ahead.
 18 MR. JONES: So I'm trying to finish up this
 19 day, is what I'm trying to do.
 20 MR. WHITEHEAD: Gotcha.
 21 Q. BY MR. JONES: After the surgery, you're
 22 drinking your toast and drinking your juice. And
 23 Dr. Pressman comes in and tells you what you said. And
 24 you bring up the Flomax.
 25 And you can't remember anything else?

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1 A. I didn't bring up the Flomax. He brought up
 2 the Flomax.
 3 Q. No. He asked you if you had taken it, and you
 4 said, "Yes."
 5 A. Yes.
 6 Q. Anything else that you can recall being said
 7 that day before you left the surgery center and went
 8 home?
 9 A. Just what he told me. And they told me to
 10 sleep with a guard. They give you some kind of a guard
 11 over your eye so you don't injure the eye when you're
 12 sleeping. And to come back to see -- I had an
 13 appointment with him the next day at such and such a
 14 time.
 15 Q. And the plan was for you to stay in the hotel
 16 that night?
 17 A. Yes.
 18 Q. Did you have any pain in your eye when you
 19 left?
 20 A. If it was, it was minor.
 21 Q. Was your eye bothering you at all before you
 22 left, to your memory?
 23 A. No.
 24 Q. Were you given any medications to take home
 25 with you?

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1 A. You know, I think I was given something for
2 pain, but I can't recall.
3 Q. Do you remember ever filling that, if you were
4 given something, or were you given the actual pills?
5 A. I don't recall.
6 Q. You can't remember if you ever took any pain
7 medication either?
8 A. I might have in the hotel room, taken some
9 aspirin or Aleve or something like that. But I don't
10 recall that they gave me any specific medication.
11 Q. Do you recall being given any documentation or
12 paperwork by Dr. Pressman or anybody with the surgery
13 center before you left that day?
14 A. After the surgery?
15 Q. After the surgery.
16 A. I don't recall that, no.
17 Q. Anything else that you can recall about that
18 day that we haven't talked about, the day of the surgery
19 itself?
20 A. No.
21 MR. JONES: Okay. We can take your break.
22 Thank you.
23 MR. WHITEHEAD: Thank you.
24 (A recess was taken.)
25 Q. BY MR. JONES: Back on the record after a

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1 short break for snack and lunch.
2 We're talking about postoperatively. And you
3 were telling me that you had stayed the night at the
4 hotel after the surgery, correct?
5 A. Yes.
6 Q. Anything happen during the night, that first
7 night, as far as the condition of your eye?
8 A. (No audible response.)
9 Q. Your answer is no?
10 A. No. No.
11 Q. The next morning, you wake up, and you have an
12 appointment to see Dr. Pressman, correct?
13 A. Yes.
14 Q. Do you have any memory of that appointment?
15 A. Just vaguely. I believe he said -- took off
16 whatever he had on my eye and told me to wear the
17 protective thing for a few nights and reassured me that
18 it would improve.
19 Q. Anything else you can remember about that
20 first postoperative visit the day after your surgery?
21 A. No.
22 Q. You remember that's when your patch was first
23 taken off?
24 A. I believe so.
25 Q. Do you remember how well you could see out of

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1 your right eye when they took the patch off?
2 A. I couldn't see well at all. It was a big blob
3 that looked like -- I used to kid her that it was my
4 rhinoceros. It was a floater, big floater. It was
5 permanent -- just permanently dark black.
6 Q. Would it move around?
7 A. To some extent, yeah.
8 Q. Could you see light?
9 A. I could see light.
10 Q. If you covered up your left eye, would you be
11 able to see anything, recognize anything, on your right
12 eye?
13 A. No.
14 Q. So that's what it was like right after
15 surgery?
16 A. Yes.
17 Q. Do you remember taking anything with you from
18 Dr. Pressman's office that day --
19 A. No.
20 Q. -- the 1st of June?
21 A. No, I don't remember.
22 Q. Anything else that you can tell me other than
23 what you already told me about that first post-op on
24 June 1?
25 A. Not that I can recall.

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1 Q. No memory of anything else that was said or
2 what you said?
3 A. Just that he -- of course, I was concerned
4 that he had not -- had problems; that he had to revert
5 to the old technique. And so I may have asked him, Will
6 this improve?" And he assured me it would.
7 Q. Anything else that you can recall?
8 A. No.
9 Q. Do you remember how long you were there?
10 A. Just a short period of time.
11 Q. Do you remember -- if I said ten minutes,
12 twenty minutes, half hour, would you know?
13 A. I had to wait a while, but the time with him
14 was very short.
15 Q. Can you put a time on it, an estimate?
16 A. Well, they put you in a room and let you sit
17 there; so I suppose 15 minutes.
18 Q. Was that 15 minutes with Dr. Pressman?
19 A. I couldn't tell you. I just remember it was a
20 short -- you were waiting in the car. It was a short
21 period of time.
22 Q. So on that June 1st postoperative visit, your
23 wife waited down in the car the whole time?
24 A. Yes.
25 Q. Do you agree with me, Franz, that nobody at

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27 (Pages 105 to 108)

1 The Eye Associates, including Dr. Pressman, knew that
2 you had ever taken Flomax until after your surgery on
3 May 31, 2006?
4 A. Must have been, because he asked the question.
5 Q. You never disclosed it prior to that time that
6 you had ever taken Flomax, correct?
7 A. No.
8 Q. Correct?
9 A. Correct.
10 Q. So if you hadn't told him, there wouldn't be
11 any way for anybody at The Eye Associates, including
12 Dr. Pressman, to know that you had ever taken Flomax,
13 correct?
14 MR. WHITEHEAD: Object to the form.
15 THE WITNESS: Yeah, there would be. It was in
16 my pre-op report from Dr. Paris.
17 Q. BY MR. JONES: What was in there?
18 A. That I had taken Flomax.
19 Q. You have that Exhibit 3 in front of you. I'll
20 see if I can find a page number. How about 26 and 27?
21 What are you looking at on those two pages
22 that supports the statement that you believe --
23 A. It said Plan, and then said prescription,
24 Flomax, .4-milligram, one tab q.i.d., or whatever,
25 signed by Richard Paris.

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1 Q. You're reading at the bottom of page 27 where
2 it says RX --
3 A. Yes.
4 Q. -- Flomax?
5 A. Yes.
6 Q. That's not an accurate statement, though, is
7 it?
8 A. Why not?
9 Q. Are you saying you imply by reading that,
10 that's supposed to mean you're taking Flomax?
11 A. It would to me.
12 Q. But you weren't taking Flomax.
13 A. No. But I had taken it.
14 Q. So you're interpreting this document to mean
15 that that implied that Dr. Pressman should have known
16 you were on Flomax?
17 A. If he would have read the document, he'd have
18 known that I had taken Flomax.
19 Q. On your health history forms, the numerous
20 ones that you had completed, you never said that you
21 were taking Flomax.
22 MR. WHITEHEAD: Object to the form.
23 THE WITNESS: That's because they asked me was
24 I taking it, and I wasn't. But this said Dr. Paris had
25 prescribed it for me.

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1 Q. BY MR. JONES: But you didn't disclose that
2 you were taking it.
3 A. I wasn't when I filled out the forms.
4 Q. But you didn't take Flomax between the time
5 period that you saw Dr. Paris on May 27th, 2006, until
6 you had the surgery on May 31, 2006, you never took
7 Flomax?
8 A. No. I saw Dr. Paris in October of -- or
9 Dr. Pressman in October of 2005. I had the surgery in
10 May of 2006, as I recall. And I took Flomax between
11 those dates.
12 Q. I'm talking about when you went to see
13 Dr. Paris the end of May 2006.
14 A. Uh-huh.
15 Q. The document that you were looking at just
16 now.
17 A. Yeah.
18 Q. You never took Flomax between the time you saw
19 Dr. Paris in May until you had the surgery by
20 Dr. Pressman the last day of May 2006?
21 A. Right.
22 Q. Correct?
23 A. Yes.
24 Q. After you left Dr. Pressman's office on
25 June 1st, do you remember taking any medication for your

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1 eye?
2 A. I may have. I don't know. I may have taken
3 some mild painkillers or -- but it wasn't -- I don't
4 recall any prescription drug.
5 Q. So you don't recall taking anything for your
6 eye after you left June 1st, 2006?
7 A. Not specifically, no.
8 Q. When was the next time you can recall seeing
9 Dr. Pressman after the June 1st visit?
10 A. I saw -- as I recall, I saw Dr. Pressman one
11 other time. And then much to my chagrin, he said he was
12 leaving. And then I saw Dr. Kent three times, if I
13 recall. Two or three times.
14 Q. So your memory is you saw Dr. Pressman on
15 June 1st, then you saw him one other time?
16 A. I saw him the day after surgery. Then as I
17 recall, I saw him one other time.
18 Q. Do you remember anything about that visit?
19 A. He checked me and said it will -- "Don't
20 worry. It will improve." And it was very brief. And
21 he gave me an appointment to come back.
22 Q. Beyond that, do you have any other memory of
23 this other visit with Dr. Pressman?
24 A. No.
25 Q. Was anyone with you for that visit?

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1 A. No.
2 Q. So your memory is that after seeing
3 Dr. Pressman a second time after the surgery, that you
4 didn't see him after that again?
5 A. No.
6 Q. You said something about learning that
7 Dr. Kent was going to be caring for you?
8 A. Yes.
9 Q. What's your memory as to how that came up?
10 A. Dr. Pressman said he was going to be gone, and
11 Dr. Kent would see me at my next appointment.
12 Q. Did you have any understanding as to why he
13 would be gone?
14 A. He said he was -- I think -- the way he said
15 it, I thought he was going on some kind of a mission or
16 something, because he mentioned that his wife was going
17 with him.
18 Q. So it's your understanding that -- I'm trying
19 to learn when the first time was that you heard this.
20 A. That was the first time.
21 Q. So you're saying the second postoperative
22 visit to see Dr. Pressman, which also happened to be the
23 last time that you saw him, he told you he was leaving
24 on a mission?
25 A. He didn't say mission. He said he was going

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1 someplace. I presumed. He didn't go into great detail.
2 He just said, "I won't be here for your next
3 appointment. Dr. Kent will see you. I'm going to be
4 gone." In the conversation, I think he was -- I thought
5 he might be going on a mission or going to donate his
6 time someplace.
7 Q. You mean like a medical mission?
8 A. Something like that.
9 It was first called to my attention in the
10 waiting room when a lady brought her youngster in for,
11 obviously, a follow-up to some kind of surgery, and she
12 says, "I understand Dr. Pressman is leaving."
13 Q. That was that visit as well?
14 A. Yes.
15 Q. Did you see any signs up in the office?
16 A. That he was leaving?
17 Q. Yes.
18 A. No.
19 Q. Anything else that you can recall about that
20 last visit that you had with Dr. Pressman other than
21 what you've told me?
22 A. No.
23 Q. Do you know how long it was, roughly, between
24 the June 1st visit and when you came back to see
25 Dr. Pressman?

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1 A. I think I saw him then in July.
2 Q. It was over a month later before you went
3 back?
4 A. I think so, yeah.
5 Q. Do you have any memory of how your vision was
6 going during that time period?
7 A. It hadn't improved. But Dr. Kent also said it
8 would improve. They were hopeful.
9 Q. So from a time line of events here, after the
10 June 1st appointment with Dr. Pressman, you saw him one
11 more time that you think was in July; is that correct?
12 A. No. June.
13 Q. Okay. So you saw him again in June?
14 A. I saw him the day after the surgery. And then
15 I saw him a week or two later.
16 Q. Okay. After you saw Dr. Pressman the second
17 time, which you put around the middle of June then --
18 A. Yeah.
19 Q. -- you didn't see Dr. Pressman again after
20 that, correct?
21 A. No.
22 Q. So when you returned for your next visit that
23 had already been scheduled, it was with Dr. Kent?
24 A. Yes.
25 Q. What, if anything, do you recall about your

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1 first visit with Dr. Kent?
2 A. He was hurried, rude, and rude. And I did not
3 care for Dr. Kent at all. I had a feeling that he was
4 trying to push me out of door.
5 Q. Other than your impression that you've just
6 shared with me, can you remember anything specific that
7 was said?
8 A. No. He just looked at the eye and said, "It
9 will get better."
10 Q. Do you remember him examining your eye?
11 A. He looked at it through the -- whatever they
12 use.
13 Q. Do you remember him putting any drops in your
14 eye?
15 A. No.
16 Q. You don't remember him saying anything more
17 about the condition of your eye beyond what you've
18 already said?
19 A. No.
20 Q. And then you indicated that you had more than
21 one visit with Dr. Kent, correct?
22 A. Yes.
23 Q. Do you have any memory of those subsequent
24 visits with Dr. Kent?
25 A. They were very similar.

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1 Q. But if I asked you, can you remember any
2 specifics of those visits?
3 A. Other than the -- that I was reassured that in
4 a matter of time, it would improve.
5 Q. Did you have an understanding as to what was
6 going on with your eye?
7 A. Only from what Dr. Pressman had told me.
8 Q. Beyond what you've already told me that you
9 brought up the Flomax -- we talked about that. But did
10 you have any other understanding beyond that as to what
11 was going on with the condition of your eye and why your
12 vision was the way it was?
13 A. Only what he told me; that he had had
14 problems; that he had sucked up part of the retina and
15 he had -- couldn't put the lens in that he wanted to.
16 Q. So he told you that he had sucked out part of
17 the retina?
18 A. He said he had sucked out some of the
19 surrounding tissue, and it had caused a wrinkle in the
20 epiretinal membrane. And he was also on the verge of
21 damaging the zonular fibers.
22 Q. He was on the verge of damaging the zonular
23 fibers?
24 A. Which is why he quit.
25 Q. Anything else?

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1 A. No.
2 Q. So you don't have any memory of Dr. Kent
3 explaining to you what was going on or what he was
4 trying to do? You have no memory of that?
5 A. My memory is he just checked me and said,
6 "Come back."
7 Q. So you saw Dr. Kent two or three times; you
8 don't remember?
9 A. I think it was three, but it might have only
10 been two.
11 Q. Who did you see after that?
12 A. Dr. Kent at either the second or third time,
13 whichever it was. Whether I saw him two or three, I'm
14 not quite exact on.
15 Q. Who did you --
16 A. The last time I saw Dr. Kent, he said, "You
17 need to see a retinologist." He referred me to
18 Dr. Harf.
19 Q. Did he say why?
20 A. He said because the retina has been damaged.
21 Q. Those were his words, that "your retina has
22 been damaged"?
23 A. That's why he wanted me to see the
24 retinologist.
25 Q. Is that what he said, "I want you to go see

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1 Dr. Harf because your retina has been damaged"?
2 A. Yes, or words to that effect.
3 Q. Did he say anything else?
4 A. No.
5 Q. Did he say when your retina has been damaged?
6 A. Dr. Pressman implied that it was damaged
7 during the surgery.
8 Q. Did Dr. Kent tell you when your retina had
9 allegedly been damaged?
10 A. Dr. Kent doesn't communicate.
11 Q. I'm just asking the question.
12 A. No, he didn't. He was very uncommunicative.
13 Q. Anything else that you can recall Dr. Kent
14 sharing with you other than the fact that he made this
15 referral for you to go see a retinologist?
16 A. No.
17 Q. Did he tell you who that retinologist would
18 be?
19 A. He said that -- he gave me a name, Dr. Harf.
20 Q. Did he already set up an appointment for you,
21 or how did it come to be that you saw him?
22 A. No. I called Dr. Harf and saw him.
23 Q. Did your wife go with you to any of the
24 appointments with Dr. Kent?
25 A. No.

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1 Q. Just to wrap all that up then, all --
2 A. She went down to Boise with me.
3 Q. She wasn't present for the examination?
4 A. No, she wasn't present.
5 Q. So the record is clear -- because we talked
6 over each other a little bit -- for none of the
7 appointments that you had with anybody at The Eye
8 Associates, including Dr. Kent or Dr. Pressman, or at
9 the surgery center, your wife was not present for any of
10 those visits or those experiences?
11 A. No. Except postoperative.
12 Q. That's correct. I'll give you that.
13 You said one postoperative visit right at the
14 surgery center?
15 A. Yes.
16 Q. Other than that, nobody else was around but
17 you?
18 A. No.
19 Q. Is that correct?
20 A. Yes.
21 MR. WHITEHEAD: Well, and the doctor.
22 THE WITNESS: And the doctor.
23 Q. BY MR. JONES: Tell me a little bit about your
24 evaluation or your experience with Dr. Harf.
25 A. I like Dr. Harf. He told me that I would need

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30 (Pages 117 to 120)

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1 retinal surgery. He wanted to schedule me. I told him
2 that I wanted let me think about it. I didn't tell him
3 that I wanted to get another opinion, but I did. And I
4 subsequently decided to go to the Moran Eye Center.
5 Nothing against Dr. Harf, but I just went to the eye
6 center to have them check me out, and I felt more
7 comfortable there.

8 Q. Do you remember anything else that Dr. Harf
9 specifically told you?

10 A. No. He said there was damage to the retina
11 and he would have to -- do, I think he said an
12 epiretinal peel.

13 Q. Did he explain to you what that was?

14 A. Yeah.

15 Q. Is it fair to say that you don't have a memory
16 of how he explained it?

17 A. Not completely, no.

18 Q. So you went to see Dr. Harf based on
19 Dr. Kent's referral?

20 A. Uh-huh.

21 Q. He indicated that you were a candidate for
22 further procedures?

23 A. Dr. Harf did, yes.

24 Q. Dr. Harf did?

25 A. Yes.

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1 Q. Was it just this one procedure or was it more?

2 A. Well, initially it was one, to do the
3 epiretinal peel, or to operate on the -- surgery on the
4 retina.

5 Q. By the time you went to see Dr. Harf, had your
6 vision changed any from the day after surgery?

7 A. No.

8 Q. So it's your memory that your vision, the
9 visual acuity that you have in your right eye, was the
10 same from the day after surgery, June 1st of 2006, until
11 you went to see Dr. Harf in October of 2006?

12 A. Yes.

13 Q. Based on what Dr. Harf told you, you then
14 decided to go seek somebody from the Moran Eye
15 Institute's advice?

16 A. Yes, just for a second opinion.

17 Q. How did you come to see them?

18 A. I was referred to them by a friend of my
19 wife's.

20 Q. A non-healthcare person?

21 A. A person who had eye treatment there.

22 Q. So were you seeking out a specific doctor, or
23 did you just want to come down and see somebody?

24 A. A lady gave us a -- the referral, gave us a
25 lady to call down there who directs traffic. I

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1 explained to her my situation. She says, "I'll schedule
2 you with Dr. Teske."

3 Q. That's how it came to be that you saw him?

4 A. Yes.

5 Q. What do you recall about seeing Dr. Teske, if
6 anything?

7 A. I was very impressed with Moran Eye Center. I
8 felt very comfortable by reputation and also the way
9 they handled me. So he checked the eye and said that
10 they've got an instrument that they can test the
11 pressure in the eye and so forth. And he says, "We've
12 gotta wait a while for the pressure to go down." And he
13 put me on some drops, which I believe were cortisone, so
14 forth.

15 Then I went back one or two more times before
16 they scheduled me for the surgery.

17 Q. When you went to the Moran Eye Center and
18 Dr. Teske put you on these cortisone drops, is that the
19 first time that you can remember taking drops for your
20 eye?

21 A. They might have given me some postoperative
22 drops at the eye center in Boise, but I don't
23 specifically remember those.

24 Q. Now, you said something a moment ago about
25 your experience and the reputation at the Moran Eye

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1 Center. I take it you feel very strongly that that's a
2 good facility?

3 A. Very.

4 Q. Do you think the physicians there are
5 competent?

6 A. Yes.

7 Q. So you wouldn't hesitate going back there for
8 care?

9 A. No.

10 Q. So you see Dr. Teske, it sounds like a few
11 times, and then he did something for you procedure-wise?

12 A. Yes.

13 Q. Do you remember what he did?

14 A. He did an epiretinal peel.

15 Q. Prior to the time that he did that epiretinal
16 peel, had the vision in your right eye improved any?

17 A. No.

18 Q. Had it worsened?

19 A. No.

20 Q. So just stagnant, stayed the same?

21 A. Just like it was following the surgery, the
22 original surgery.

23 Q. What did that procedure, if anything, do for
24 you?

25 A. It removed the big dark blob.

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31 (Pages 121 to 124)

1 Q. So were you able to see better with the eye?
2 A. I was able to see better. I felt more
3 comfortable driving. The vision -- the blob was gone;
4 so that helped.
5 Q. From the time after surgery with Dr. Pressman
6 until the epiretinal peel by Dr. Teske, did your right
7 eye give you any pain?
8 A. Occasionally, yeah, I would feel pressure.
9 Q. Beyond pressure, did you feel pain, though?
10 A. Not -- a little discomfort sometimes, but not
11 excruciating pain.
12 Q. Did you have to take any pain medication?
13 A. Not that I recall, not specifically.
14 Q. So after this peel, this blob you've described
15 in your right eye was gone.
16 How would you describe your vision in your
17 right eye after that?
18 A. It -- once the blob was gone, it wasn't as --
19 such a distraction. I was never able to read anything
20 except -- or make out anything on the eye chart except
21 the large B. And -- but they said that was to be
22 expected until I had the cataract surgery redone in that
23 eye.
24 Q. After the surgery done by Dr. Pressman in May
25 of 2006, did you continue to drive?

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1 A. Cautiously. And Betty drove for me a lot of
2 the time.
3 Q. But did you still drive?
4 A. During the day.
5 Q. Do you still have a license?
6 A. Yeah.
7 Q. Did you ever have a time period where you
8 didn't have a license to drive?
9 A. No.
10 Q. Do you have any restrictions on your license?
11 A. Do you know why?
12 MR. WHITEHEAD: Don't ask him questions.
13 Q. BY MR. JONES: Let me ask the questions.
14 A. But you should know why.
15 Q. Let me ask these next few questions, and then
16 I'll let you fill me in. Okay?
17 My question was, did you ever stop driving?
18 Your answer was no.
19 A. No.
20 Q. I asked you if you ever had any restrictions
21 placed on your license to drive. What's your answer to
22 that question?
23 A. No.
24 Q. And then you wanted to say something.
25 A. They don't test your eyes.

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1 Q. That must just be a Hailey thing, because when
2 I get my driver's license, they test me.
3 A. I was afraid I was going to lose my license,
4 so I memorized the eye chart. But when I went in, they
5 don't test the eyes, even on somebody my age. I was
6 surprised.
7 Q. How did you memorize the eye chart?
8 A. With difficulty. I don't know if I would have
9 passed even then because my memory isn't that great.
10 Q. Do you recall anybody ever discussing the term
11 "cystoid macular edema" with you?
12 A. I remember the words "macular" and "edema."
13 Q. Do you remember who first described those to
14 you?
15 A. No.
16 Q. It sounds like you didn't have a very good
17 experience with Dr. Kent. Would that be a nice way of
18 saying it?
19 A. Yes.
20 Q. Did you have that same impression of
21 Dr. Pressman?
22 A. No.
23 Q. Did you have any concerns with his demeanor
24 with you?
25 A. No.

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1 Q. Did you feel he had been honest with you?
2 A. Yes.
3 Q. Did you ever have any health care provider be
4 critical of the care that Dr. Pressman gave?
5 A. Both Dr. Teske and Dr. Crandall were guarded.
6 They did both say that the problem was the result of the
7 first cataract surgery.
8 Q. That makes sense to me. I understand that.
9 But did any health care provider say that
10 Dr. Pressman had done something wrong during the
11 surgery?
12 A. Indirectly.
13 Q. What's your understanding as to what they said
14 indirectly?
15 A. I said, "I'm going to have cataract surgery on
16 the other eye. Will we have the same problem?" And he
17 said, "No. I will be prepared for that."
18 Q. Beyond what you just said, did you obtain any
19 inferences as you've described it from any health care
20 provider that Dr. Pressman had done anything incorrectly
21 during the surgery on your cataract on your right eye?
22 A. I never asked or pushed them on it, and they
23 didn't volunteer.
24 Q. So when you had the cataract operated on on
25 your left eye, who was that done by?

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1 A. Dr. Crandall.
2 Q. Obviously, he knew you were taking Flomax?
3 A. Yes.
4 Q. You had started taking it again by that point,
5 correct?
6 A. Yes.
7 Q. Has anybody ever explained to you what Flomax
8 does or doesn't do that might impact cataract surgery?
9 A. Just Dr. Pressman. And down there, they just
10 said, "Yes, it affects it. Don't worry. We'll be
11 prepared for it."
12 Q. They didn't explain to you how it affects it?
13 A. No. Just that it softens the tissues, and you
14 had to -- you had to stretch the eye real taut when you
15 went to suck out the broken-up lens.
16 Q. The cataract?
17 A. The lens. Yeah, the cataract, which is the
18 lens.
19 Q. I see you're wearing glasses today.
20 A. Uh-huh.
21 Q. You drove here today, correct?
22 A. Uh-huh.
23 Q. Is your answer yes?
24 A. Yes.
25 Q. You're able to read the newspaper, correct?

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1 A. Not with my right eye.
2 Q. When you read, you only read with one eye?
3 A. Read with one eye.
4 Q. What is the level of vision that you have in
5 your right eye?
6 A. They said -- the doctor said I would be
7 considered legally blind in my right eye.
8 Q. What doctor?
9 A. Dr. Crandall.
10 Q. So you're saying he made that statement to
11 you?
12 A. Yes. When you go in to see him, you always go
13 to an optician type first. They give you all the tests.
14 He said it, and Dr. Crandall said it.
15 Q. So are you saying with glasses on over your
16 right eye, you can't see anything?
17 A. No. I can see. I can see you, but you're
18 blurry. I can't read that, the subtitles on that chart
19 there. With my left eye, I can read it perfectly.
20 Q. So you have perfect vision in your left eye?
21 A. I don't know if it's perfect. But I had
22 cataract surgery done there, too, and it was successful.
23 Q. It's my understanding from the records of
24 yours that I've reviewed that they removed and replaced
25 the lens in your right eye.

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1 A. Yes.
2 Q. So you have another lens in your right eye?
3 A. Yes.
4 Q. So as a result of that lens, you are able to
5 have some vision in your right eye?
6 A. Yes.
7 Q. That vision is enhanced by the glasses you're
8 wearing?
9 A. I'm not sure that the glasses do any good for
10 the right eye.
11 Q. Do you have a prescription in your right lens?
12 A. Yes. But I haven't changed glasses.
13 Q. Is there anything, Franz, that you can't do
14 today that you could do before May of '06?
15 A. I can't -- if I'm reading fine print or
16 anything like that, I use a magnifying glass or readers.
17 I quit skiing because I'm -- with this eye not working
18 right, I'm worried about getting hit by one of these
19 crazies. I often have to have my wife read things for
20 me.
21 Q. What is the last time that you went skiing?
22 A. I went skiing the winter after the surgery.
23 Q. So that would have been the winter of 2006?
24 A. Yes.
25 Q. Into 2007?

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1 A. Yeah.
2 Q. You haven't skied since then?
3 A. No.
4 Q. Anything else that you --
5 A. If you cleared the hill, I'd ski. But I'm
6 very cognizant that I don't see well off of this eye.
7 Q. Do you have a season pass that you would buy?
8 A. No.
9 Q. You just bought as you went whenever you went
10 skiing?
11 A. Yeah.
12 Q. Anything else in terms of examples of things
13 that you can't do now that you could do before the
14 surgery in May of 2006?
15 A. I can't thread my fly hook. I usually don't
16 drive at night. And like I say, I struggle when I'm
17 reading.
18 Q. Today, when I pulled into the parking lot, I
19 happened to be parked next to you, and didn't realize at
20 the time, but it looked like you were reading the daily
21 paper.
22 A. I was.
23 Q. So you are able to read the news and things
24 like that?
25 A. Sometimes. It depends on the size of the

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33 (Pages 129 to 132)

1 print and so forth. With this eye I can, you know,
2 function fine.
3 Q. With your left eye?
4 A. With my left eye.
5 Q. And you have a computer at home, obviously.
6 A. Yes.
7 Q. And you're able to operate the computer?
8 A. Yes.
9 Q. Do you have any special monitor at home?
10 A. Just my magnifying glass.
11 Q. No, no, no. I mean, for your computer.
12 A. Oh, no.
13 Q. It's a normal monitor?
14 A. Yeah.
15 MR. WHITEHEAD: Object to the form.
16 Q. BY MR. JONES: In other words, the monitor
17 doesn't have any special features because of the
18 condition of your right eye?
19 A. No. But I've thought of getting one.
20 Q. At this point you haven't?
21 A. No.
22 Q. Sitting across the room, looking at your eye
23 and as close to you as I've been today, I have a hard
24 time seeing anything outwardly that's wrong with the
25 eye.

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1 As you look at your eye, are you able to see
2 something is that standing out as unusual about the
3 appearance of the eye?
4 A. If I get up close and look to it?
5 Q. Yeah.
6 A. In a mirror like that and so forth?
7 Q. Yeah.
8 A. No.
9 Q. So the eye looks normal to you?
10 A. (No audible response.)
11 Q. Yes?
12 A. Yes.
13 THE REPORTER: What did you say, Counsel?
14 MR. WHITEHEAD: I just objected to the form.
15 Q. BY MR. JONES: Do you have any pictures of how
16 your eye looked any time after the surgery in May of
17 '06?
18 A. No.
19 Q. We talked at the start of the deposition about
20 any prior depositions.
21 Have you been involved in any other lawsuits?
22 A. No. Just as a member of the school board,
23 which was being sued.
24 Q. Sure.
25 A. But nothing personal.

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1 Q. Anything else in terms of conversations with
2 Dr. Pressman that you can think of that we haven't
3 talked about?
4 A. No.
5 Q. Other than the information that your wife will
6 have, both from being here for this deposition and from
7 her involvement in this case, can you think of anybody
8 else, any friends or family that you have shared issues
9 of this case with?
10 A. My family back in Washington heard about the
11 problem that I was having. And they've inquired as to
12 how I was doing.
13 Q. Other than just keeping them abreast, anything
14 beyond that?
15 A. No.
16 MR. JONES: That's all I have for today.
17 Thank you.
18 MR. WHITEHEAD: No questions. Read and sign.
19 (Deposition concluded at 2:09 p.m.)
20
21 (Signature requested.)
22
23 (In an off-the-record discussion, Mr. Whitehead ordered
24 a copy of the deposition transcript.)
25 -o0o-

Page 135

34 (Pages 133 to 135)

Exhibit B

Eagle Eye Surgery and Laser Center
3090 Gentry Way Suite 100
Meridian, ID 83642

Name: Franz Subadolnik

DOB: 7-24-31

Cataract Operation, and/or Implantation of Intraocular Lens
and NA

This information is given to you so that you can make an informed decision about having eye surgery. You have the right to ask questions about any procedure before agreeing to have the operation

Except for unusual problems, a cataract operation is indicated only when you cannot function adequately due to poor sight produced by the cataract. You must remember that the natural lens within your own eye with a slight cataract, although not perfect, has some distinct advantages over any man made lens.

After your doctor has told you that you have a cataract, you and your doctor are the only ones who can determine if or when you should have a cataract operation. This is based on your own visual needs, and medical consideration, unless you have an unusual cataract that may need immediate surgery.

CONSENT FOR YOUR OPERATION

In giving my permission for a cataract extraction and/or for the possible implantation of an intraocular lens in my eye, I declare I understand the following information:

1. Cataract surgery, by itself, means the removal of the natural lens of the eye by a surgical technique. In order for an intraocular lens to be implanted in my eye, I understand I must have cataract surgery performed either at the time of the lens implantation or before lens implantation. At the time of surgery, my doctor may decide not to implant an intraocular lens in my eye even though I may have given prior permission to do so.
2. When an intraocular lens is implanted, it is done by the surgical method. It is intended that the small plastic lens (with polypropylene or plastic supports) will be left in my eye permanently.
3. The results of surgery in my case cannot be guaranteed.
4. In the process of the surgery, my physician may deem it necessary to perform additional procedures. These may include but are not limited to using a capsular staining technique,

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performing a pupillary stretch procedure or choosing to provide a relaxing incision to correct astigmatism.

5. Complications of surgery to remove the cataract. As a result of the surgery, it is possible that my vision could be made worse. In some cases, complications may include hemorrhage (bleeding). Loss of corneal clarity, infection, detachment of the retina, glaucoma, and/or double vision. These and other complications may occur whether or not a lens is implanted and may result in poor vision, total loss of vision or loss of the eye.
6. Specific complications of lens implantation: Insertion of an intraocular lens may induce complications which otherwise would not occur. In some cases complications may develop days, weeks, months, or even years later. Complications may include loss of corneal clarity, infection, uveitis, iris atrophy, glaucoma, bleeding in the eye, inability to dilate the pupil, dislocation of the lens and retinal detachment.
7. At some future time, the lens implanted in my eye may have to be repositioned or removed surgically.
8. Complications of surgery in general: As with all types of surgery, there is the possibility of other complications due to anesthesia, drug reactions or other factors which may involve other parts of my body, including a possibility of brain damage or even death. Since it is impossible to state ever complications that may occur as a result of surgery, the list of complications in this form is incomplete.

The doctor has explained the basic procedure of cataract surgery, advantages and disadvantages, risks and possible complications and of alternative treatments. Although it is impossible for the doctor to inform me of every possible complication that may occur, the doctor has answered all my questions to my satisfaction and will answer any further questions I may have. In signing this information consent for the cataract operation with lens implantation of intraocular lens, I am stating I have read this informed consent (or it has been read to me) and I fully understand it and the possible risks, complications and benefits that can result from the surgery.

SUMMARY

I understand that if I give my consent, my doctor will surgically remove the cataract lens from my eye and/or implant an artificial lens in its place. However, at the time of surgery, my doctor may decide NOT to implant an intraocular lens, even though I have given permission to do so. I understand that complications can occur and that the results of my surgery cannot be guaranteed. I am aware that there are alternatives to having an artificial lens implanted, and these alternatives have been explained to me.

I agree to have a cataract operation with an intraocular lens implanted in my Right eye

Patient Signature [Signature] Date 5-3-06

Witness' Signature [Signature]

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Exhibit C

CONSENT FOR ANESTHESIA SERVICES

Franz Suhadolnik acknowledge that my doctor has explained to me that I will have an operation, diagnostic or treatment procedure. My doctor has explained the risks of the procedure, advised me of alternative treatments and told me about the expected outcome and what could happen if my condition remains untreated. I also understand that anesthesia services are needed so that my doctor can perform the operation or procedure.

It has been explained to me that all forms of anesthesia involve some risks and no guarantees or promises can be made concerning the results of my procedure or treatment. Although rare, unexpected severe complications with anesthesia can occur and include the remote possibility of infection, bleeding, drug reaction, blood clots, loss of sensation, loss of limb function, paralysis, stroke, brain damage, heart attack or death. I understand that these risks apply to all forms of anesthesia and that additional or specific risks have been identified below as they may apply to a specific type of anesthesia. I understand that the type(s) of anesthesia service checked below will be used for my procedure and that the anesthetic technique to be used is determined by many factors including my physical condition, the type of procedure my doctor is to do, his or her preference, as well as my own desire. It has been explained to me that sometimes an anesthesia technique which involves the use of local anesthetics, with or without sedation may not succeed completely and therefore another technique may have to be used including general anesthesia.

General Anesthesia	Expected Results	Total unconscious state, possible placement of a tube into the windpipe.
	Technique	Drug injected into the bloodstream, breathed into the lungs, or other routes.
	Risks	Mouth or throat pain, hoarseness, injury to mouth or teeth, awareness under anesthesia, injury to blood vessels, aspirations, pneumonia.
Monitored Anesthesia Care (with sedation) X	Expected Results	Reduced anxiety and pain, partial or total amnesia.
	Technique	Drug injected into the bloodstream, breathed into the lungs, or other routes producing a semi-conscious state.
	Risks	An unconscious state, depressed breathing, injury to blood vessels.
Monitored Anesthesia care (without sedation)	Expected Results	Measurement of vital signs, availability of anesthesia provider, injury to blood vessels.
	Technique	None.
	Risks	Increased awareness, anxiety and/or discomfort.

I hereby consent to the anesthesia service checked above and authorize that it be administered by OSPAS or his/her associates, all of whom are credentialed to provide anesthesia services at this health facility. I also consent to an alternative type of anesthesia, if necessary, as deemed appropriate by them. I expressly desire the following considerations be observed (or write "none") _____

I certify and acknowledge that I have read this form or had it read to me, that I understand the risks, alternatives, and expected results of the anesthesia service and that I had ample time to ask questions and to consider my decision.

OTHER CONSENTS:

Financial Agreement and Assignment of Benefits: I am financially responsible to Eagle Eye Surgery and Laser Center for all charges relating to this admission, and unless advance arrangements are made, I will fully pay my account upon billing. I assign to Eagle Eye Surgery and Laser Center any applicable insurance benefits to which I would be entitled, I authorize direct payment of such insurance benefits to Eagle Eye Surgery, and I will pay for any charges not covered by insurance. I will pay any legal fees incurred by Eagle Eye Surgery in collecting this account. Please initial FS

Medicare Patient Assignment of Benefits: I request that payment of authorized Medicare benefits be made either to me or on my behalf, to Eagle Eye Surgery for any services furnished to me by my physician. I authorize any holder of medical information about me to release to the Centers for Medicare and Medicaid Services and its agents any information needed to determine these benefits or the benefits payable for related services. Please initial FS

Health care rights: I have received information regarding patient health care rights including the right to make Advance Directives. Please initial FS

Franz Suhadolnik 5-31-06
Patient's signature Date

[Signature]
Witness

Substitute signature

Relationship to patient

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Exhibit D

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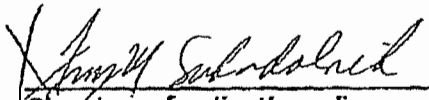
Risks and Complications of Cataract Extraction

Cataract surgery generally has better than a 95% success rate, but there are unavoidable risks with any surgery including:

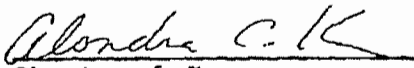
1. Possible loss of vision. Total or partial, and/or loss of the eye.
2. Post operative glaucoma or inflammation that may persist for several weeks or months.
3. Hemorrhage.
4. Infection. External or internal.
5. Retinal detachment.
6. Peaking of pupil. Enlargement of pupil or in some cases resection of part of pupil.
7. Clouding of the ligament (posterior capsule) which holds the intra-ocular lens in position may also occur following cataract surgery. This is referred to as a secondary cataract and usually requires a laser procedure to clear the vision.
8. Edema/swelling of the cornea which may prevent clear vision.
9. Please note that some of the complications listed above may result in potential need for additional surgery.
10. Patient must apply medication as directed. Keep eye protected with glasses or shield and keep follow-up appointments.
11. Post operative correction will be with contact lenses, glasses, or both. For reading, a bifocal or special reading glass may be necessary.
12. Follow-up will be gradually tapered as the eye heals.
13. I am aware that practice of medicine and surgery is not an exact science and I acknowledge that no oral or written representations, guarantees, or warranties have been made to me about the results of the operation or procedures described above.

I understand that by giving my consent, my doctor will surgically remove the cataract lens from my eye and implant an artificial lens in its place. However, at the time of surgery, my doctor may decide NOT to implant an intra-ocular lens, even though I have given permission to do so. I understand that complications can occur and that results of my surgery cannot be guaranteed. I am aware that there are alternatives to having an artificial lens implanted and these alternatives have been explained to me. (aphakia, spectacles, contact lenses)

The above document describes the major complications and risks of cataract surgery. They have been explained to me but I understand that other complications may occur. I have received a copy of this statement.


Signature of patient/guardian

Date 05/30/06


Signature of witness

Terrence S. Jones, ISB No. 5811
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants
Scott H. Pressman, M.D. and
The Eye Associates, P.A.

FILED 43
NOV 13 2009
J. DAVID NAVARRO, C
By R. BOURNE
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

AFFIDAVIT OF SCOTT H.
PRESSMAN, M.D.

STATE OF IDAHO)
 : ss.
County of Ada)

SCOTT PRESSMAN, M.D., having been first duly sworn upon oath, deposes and says:

1. The information and facts specified and recited herein are based upon your Affiant's direct and personal knowledge, and the opinions stated herein are based upon reasonable medical certainty. I am, and at all times alleged in the Complaint was, a physician licensed by the Idaho State Board of Medicine to practice medicine and surgery in the State of Idaho. I am familiar with, and have actual knowledge of, the standard of health care practice applicable to physicians engaged in the medical specialty of ophthalmology and cataract surgery in Boise, Idaho in 2006, and I engaged continuously in said medical specialty in Boise, Idaho from 10/84 through July 2006. I am board certified in ophthalmology and have been for over 20 years. During my professional career in Boise, Idaho, I am and have been acquainted with numerous physicians in Boise, Idaho who engage in ophthalmology and cataract surgery, the nature and scope of their practice in this specialty, the procedures utilized by them in this specialty in Boise, Idaho and their knowledge of the risks and benefits of cataract surgery, including the risks associated with the drug commonly known as Flomax.

2. During my professional career in Boise, Idaho, I have held medical staff privileges at St. Luke's Regional Medical Center, Saint Alphonsus Regional Medical Center, and The Eagle Eye Surgery Center, and I have been and I am familiar with the facilities, capabilities and equipment at said institutions and have participated in numerous

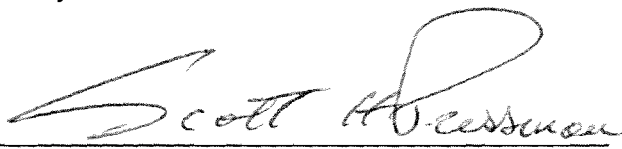
medical staff and quality review meetings at said institutions. My practice at all times pertinent to this action consisted of ophthalmology and cataract surgery.

3. It is my opinion that my care and treatment of the patient, Franz Suhadolnik, complied in all respects with the standard of health care practice applicable to physicians engaged in the medical specialty of ophthalmology and cataract surgery in Boise, Idaho in 2006 and that the care and treatment I provided was consistent with the care typically provided by such specialists in the Boise, Idaho community. This opinion is intended to encompass all aspects of my care of the patient including all pre- and post-operative care, my documented informed consent discussions, my taking of an appropriate patient history, my determination that the patient was a proper candidate for cataract surgery, the manner and method by which I performed the cataract surgery, the manner in which I responded to the complication I encountered during the cataract surgery and the nature of all other aspects of the medical care I provided and related charges and expenses. It is my opinion that the patient experienced a known and accepted complication of cataract surgery which occurred in the absence of any violation of the standard of practice on my part.

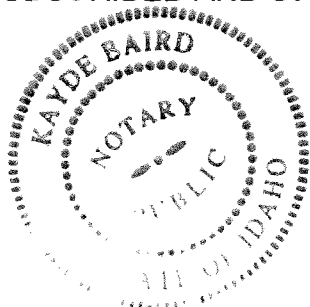
4. My care and treatment of the patient occurred in Boise, Idaho in 2006. Prior to performing cataract surgery on the patient in May 2006, I obtained an appropriate informed consent which was consistent with the requirements of Idaho law and documented by multiple forms signed by the patient himself prior to surgery. During my informed consent discussion, I disclosed the pertinent medical facts to the patient such that he was sufficiently aware of the need for, the nature of, and the significant risks ordinarily involved in the medical treatment to be provided, including the risk that he may need

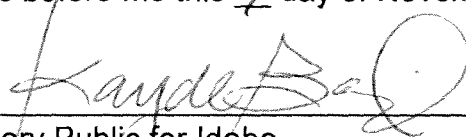
further surgery and the risk that he may experience injury to and/or loss of the vision in his eye. I did so engage in my informed consent discussion with this patient so as to ensure that the giving of consent by patient Franz Suhadolnik represented a reasonably informed decision.

5. The standard of health care practice applicable to me in May 2006 did not require me to inquire preoperatively with the patient regarding whether he had ever before taken the medication Flomax. The standard of health care practice applicable to me in May 2006 did not require me to disclose to the patient that if he had ever taken Flomax that he might experience any increase in risk associated with undergoing cataract surgery as the nature of the available medical research and literature at that point did not warrant or require such a disclosure. The fact that a patient is taking or has ever taken Flomax is not a contraindication to the performance of cataract surgery for an experienced cataract surgeon like myself who has performed cataract surgery thousands of times over the course of my career in ophthalmology. The requisite pertinent facts I disclosed to patient Franz Suhadolnik prior to performing cataract surgery represent those which would ordinarily be given by a like ophthalmologist and cataract surgeon of good standing practicing in the Boise, Idaho medical community in 2006.


SCOTT H. PRESSMAN, M.D.

SUBSCRIBED AND SWORN to before me this 9 day of November, 2009.



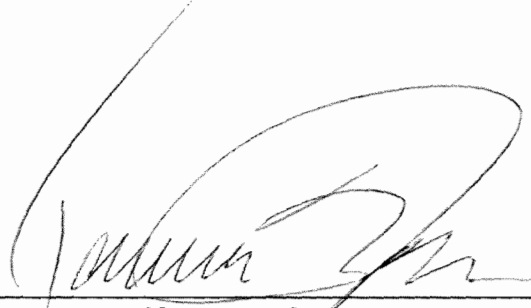

Notary Public for Idaho
Residing at Boise, Idaho
My Commission expires 9/18/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2009, I served a true and correct copy of the foregoing AFFIDAVIT OF SCOTT H. PRESSMAN, M.D. by delivering the same to each of the following, by the method indicated below, addressed as follows:

Jarom A. Whitehead
PEDERSEN & WHITEHEAD
161 5th Avenue South, Suite 301
P.O. Box 2349
Twin Falls, Idaho 83303-2349
Telephone (208) 734-2552
Attorneys for Plaintiffs
Franz Suhadolnik and Betty Suhadolnik

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 734-2772



Terrence S. Jones

NOV 13 2009

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

Terrence S. Jones, ISB No. 5811
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Facsimile (208) 345-8660

Attorneys for Defendants
Scott H. Pressman, M.D., Scott H. Pressman,
M.D., L.L.C., and The Eye Associates, P.A.

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT

I.
INTRODUCTION

This is a medical malpractice case. Before the Court is Defendants' Motion for Summary Judgment. Plaintiffs allege that the Defendants failed to obtain a valid informed consent prior to performing cataract surgery on Plaintiff Franz Suhadolnik in May 2006. **See** Plaintiffs' Complaint at Count II. Plaintiffs further allege that Dr. Pressman violated the standard of health care practice with respect to his care and treatment of Plaintiff Franz Suhadolnik in connection with the cataract surgery of May 31, 2006, and that as a result he has suffered pain, suffering and loss of vision. **See** Plaintiffs' Complaint at para 12-14 and 22-24.

Defendants deny that they committed any malpractice and deny that they in any way caused or contributed to the patient's alleged injuries. This Memorandum is submitted in support of Defendants' Motion for Summary Judgment filed contemporaneously herewith. This motion is intended to address both the standard of practice and lack of informed consent claims contained within Plaintiffs' complaint.

In order to establish a cause of action for malpractice against a licensed health care provider in Idaho, Plaintiffs must comply with the requirements of Idaho Code §§ 6-1012 and 6-1013. As discussed in greater detail below, Defendant Dr. Pressman has submitted an Affidavit which establishes that he complied with the applicable standard of health care practice with respect to his care and treatment of Plaintiff Franz Suhadolnik. Dr. Pressman has similarly outlined in his Affidavit how and why he complied with the informed consent requirements of Idaho Code §39-4506. If left unrebutted, his Affidavit,

which addresses all of the allegations contained in Plaintiffs' Complaint, would form the basis for the Court granting a summary judgment in favor of Defendants on all counts.

II. STATEMENT OF MATERIAL FACTS

1. On May 31, 2006 Plaintiff Franz Suhadolnik presented to the Eagle Eye Surgery Center where he underwent cataract surgery on his right eye performed by Defendant Dr. Pressman. The purpose of this surgery was to remove the cataract and replace it with an artificial lens. **See** Affidavit of Dr. Pressman at para 3-4, Plaintiffs' Complaint at para 7.

2. Scott H. Pressman, M.D., rendered medical services to Plaintiff Franz Suhadolnik in his capacity as a board-certified ophthalmologist and cataract surgeon who is licensed to practice medicine and surgery in the State of Idaho. **See** Affidavit of Dr. Pressman at para 1-2, Plaintiffs' Complaint at para 2.

3. At all times in which Plaintiff Franz Suhadolnik was under his care, Dr. Pressman complied in all respects with the standard of health care practice applicable to him for the time and place in question, Boise, Idaho in 2006, and said care was provided consistent with the care typically provided in the Boise, Idaho community. **See** Affidavit of Dr. Pressman at para 3.

4. In order to establish a *prima facie* case of medical malpractice against Dr. Pressman, Plaintiffs must comply with the expert witness affidavit requirements set forth under Idaho Code § § 6-1012 and 6-1013 and the case authority interpreting these statutes. **See i.e., *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 164, 45 P.3d 816 (2002).**

5. Consistent with Idaho Code §39-4506, Dr. Pressman disclosed the pertinent medical facts to the patient such that he was sufficiently aware of the need for, the nature of, and the significant risks ordinarily involved in the medical treatment to be provided, including the fact that he may need further surgery and the risk that he may experience injury to and/or loss of the vision in his right eye. **See** Affidavit of Dr. Pressman at para 4-5.

6. Dr. Pressman did so engage in his informed consent discussion with this patient so as to ensure that the giving of consent by patient Franz Suhadolnik represented a reasonably informed decision. The requisite pertinent facts Dr. Pressman disclosed to patient Franz Suhadolnik prior to performing cataract surgery represent those which would ordinarily be given by a like ophthalmologist and cataract surgeon of good standing practicing in the Boise, Idaho medical community in 2006. **See** Affidavit of Dr. Pressman at para 4-5.

III. ARGUMENT

A. DR. PRESSMAN COMPLIED WITH THE APPLICABLE STANDARD OF HEALTH CARE PRACTICE AS REQUIRED UNDER IDAHO CODE § § 6-1012 AND 6-1013

Plaintiffs' Complaint alleges that Dr. Pressman was negligent in the rendering of health care to Plaintiff Franz Suhadolnik. **See** Plaintiffs' complaint at Counts I and II. In opposition to Plaintiffs' allegations, and in support of his Motion for Summary Judgment, Dr. Pressman, on his own behalf and on behalf of Defendant Eye Associates, has submitted for the Court's consideration his Affidavit. As a licensed and board-certified physician specializing in ophthalmology and cataract surgery, Dr. Pressman is competent

under Idaho law to offer expert testimony in this case regarding the care he rendered. His Affidavit reflects that he has actual knowledge of the local standard of health care practice applicable to him as an ophthalmologist in Boise, Idaho during the time period in question, namely 2006. The Affidavit further states that Dr. Pressman's care and treatment of Plaintiff Franz Suhadolnik complied in all respects with the standard of health care practice applicable to him. **See generally**, Affidavit of Scott H. Pressman, M.D. submitted in support of summary judgment.

Within the context of a medical malpractice motion for summary judgment, in cases in which a defendant has established by expert testimony that there has been no negligent failure to meet the applicable standard of health care, a plaintiff has the burden, consistent with the requirements of I.R.C.P. 56 and Idaho Code § 6-1012, of showing the existence of a disputed issue of fact. The admissibility of evidence under I.R.C.P. 56(e) is a threshold question the trial court must analyze before applying the rules governing motions for summary judgment. **See *Shane v. Blair***, 139 Idaho 126, 128, 75 P.3d 180, 182 (2003) (citing ***Rhodehouse v. Stutts***, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994)). The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible. **Id.** **See also *Herrera v. Estay***, 146 Idaho 674, 680 (2009). Once the admissibility question under Rule 56(e) has been resolved, the court must then look for compliance with Idaho Code §6-1012:

[T]o preclude summary judgment in a medical malpractice case, it must be shown by expert testimony that there has been a negligent failure to meet the applicable standard of health care practice of the community.... I.C. § 6-1012

requires as an essential part of the plaintiff's case, affirmative proof that defendant failed to meet the applicable standard of health care practice in the community in which the care was, or should have been, provided.

Dekker v. Magic Valley Regional Medical Center, 115 Idaho 332, 333-4, 766 P.2d 1213, 1214-5 (1989); **see also Watts v. Lynn**, 125 Idaho 341, 870 P.2d 1300 (1994); **Kolln v. St. Luke's Regional Medical Center**, 130 Idaho 323, 331, 940 P.2d 1142, 1150 (1997).

The Plaintiffs in this case are required to present competent, admissible expert testimony if their claim is to survive a Motion for Summary Judgment. **See Hough v. Fry**, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998). In order to create an issue of fact as to the medical care and treatment rendered by Dr. Pressman, Plaintiffs must therefore submit expert testimony which conforms with the requirements more fully outlined by the Idaho Supreme Court in the case of **Dulaney v. St. Alphonsus Regional Medical Center**, 137 Idaho 160, 164, 45 P.3d 816 (2002). According to **Dulaney**:

To avoid summary judgment for the defense in a medical malpractice case, the plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice. In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by Idaho Code § 6-1013. To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his expert opinion testimony is addressed.

The applicable community standard of care is defined in Idaho Code § 6-1012. It is: (a) the standard of care for the class of health care provider to which the defendant belonged and was functioning, taking into account the defendant's training, experience, and fields of medical specialization, if any; (b) as such standard existed at the time of the defendant's alleged negligence; and (c) as such standard existed at the place of the defendant's alleged negligence.

Rule 56(e) of the Idaho Rules of Civil Procedure imposes additional requirements upon the admission of expert medical testimony submitted in connection with a motion for summary judgment. The party offering such evidence must show that it is based upon the witness' personal knowledge and that it sets forth facts as would be admissible in evidence. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).

An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. The expert must also state how he or she became familiar with that standard of care. . . .

Dulaney v. St. Alphonsus Regional Medical Center, 137 Idaho 160, 164, 45 P.3d 816 (2002) (citations omitted). ***See also McDaniel v. Inland Northwest Renal Care Group-Idaho, L.L.C.***, 144 Idaho 219, 222 (2007).

In the context of the case at hand, Idaho Code § 6-1012 provides that Plaintiffs must prove by direct expert testimony that Dr. Pressman "failed to meet the

applicable standard of health care practice" in Boise, Idaho in 2006 "as such standard then and there existed with respect to the class of health care provider that [Dr. Pressman] belonged to and in which capacity [he was] functioning." Idaho Code § 6-1012. This section expressly provides that in determining the standard of health care practice, "a health care provider must be compared to a health care provider with similar training and in the same category or class, 'taking into account his or her training experience, and fields of medical specialization.'" *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997); *see also Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002). "The legislative purpose of I.C. § 6-1012 was to limit the liability exposure of health care providers by making a more strict requirement for "direct proof of departure from a community standard of practice." *Jones v. Crawford*, 205 P.3d 660, 665 (2009); *see also* 1976 Idaho Sess. Laws ch. 277, § 1, p. 951; *LePelley v. Grefenson*, 101 Idaho 422, 428, 614 P.2d 962, 968 (1980).

Accordingly, Dr. Pressman's Affidavit establishes the necessary elements required by Rule 56 as well as Idaho Code §§ 6-1012 and 1013. The Affidavit, which is based on personal knowledge, establishes how Dr. Pressman has "actual knowledge" of the standard of health care practice applicable to him as an ophthalmologist and cataract surgeon in Boise, Idaho in 2006 and how he complied at all times with that standard of health care practice with respect to his care and treatment of Plaintiff Franz Suhadolnik. These opinions are sufficient to shift the burden to the Plaintiffs to respond with an expert Affidavit consistent with the requirements of *Dulaney* outlined above. In the absence of qualified expert testimony to rebut the opinions advanced by Dr. Pressman, the Plaintiffs

cannot, as a matter of law, establish a *prima facie* case. Defendants would, therefore, be entitled to summary judgment.

B. THE EVIDENCE BEFORE THE COURT ESTABLISHES THAT DR. PRESSMAN OBTAINED A VALID INFORMED CONSENT CONSISTENT WITH THE REQUIREMENTS OF IDAHO CODE § 39-4506 ET SEQ.

Plaintiffs' Complaint also alleges the Defendants failed to obtain a valid informed consent prior to the cataract surgery. It is well settled that under Idaho law, "the issue of informed consent is entirely separate from that of negligence." ***Sherwood v. Carter***, 119 Idaho 246, 251, 805 P.2d 452, 457 (1991). "A physician may be held liable under the doctrine of informed consent even if there was no negligence in the actual treatment of the patient. *Id.* See also ***Foster v. Traul***, 141 Idaho 890, 894 (2005). There are two statutes relevant to consider with the issue of informed consent. These statutes relate to the sufficiency of consent and the form of consent. These statutes provide:

39-4506. Sufficiency of consent. Consent, or refusal to consent, for the furnishing of hospital, medical, dental or surgical care, treatment or procedures shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting the need for, the nature of, and the significant risks ordinarily attendant upon, such a patient receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision. Any such consent shall be deemed valid and so informed if the physician or dentist to whom it is given or by whom it is secured has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances, by a like physician or dentist of good standing practicing in the same community. As used in this section, the term "in the same community"

refers to that geographic area ordinarily served by the licensed general hospital at or nearest to which such consent is given.

39-4507. Form of consent. It is not essential to the validity of any consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures that the consent be in writing or any other specific form of expression; provided however, when the giving of such consent is recited or documented in writing and expressly authorizes the care, treatment or procedures to be furnished, and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is presumed to be valid for the furnishing of such care, treatment or procedures, and the advice and disclosures of the attending physician or dentist, as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient.

Case law interpreting these statutes dictates that in order to "establish a claim of informed consent, the plaintiff must prove three elements: nondisclosure, causation, and injury." ***Sherwood v. Carter***, 119 Idaho 246, 257, 805 P.2d 452, 463 (1991); ***see also Foster v. Traul***, 145 Idaho 24, 28 (2007). To prove the element of nondisclosure, the Supreme Court in ***Anderson v. Hollingsworth***, 136 Idaho 800, 805, 41 P. 3d 228, 233 (2001) stated that the patient must prove the defendant physician failed to meet the objective, medical community-based standard of disclosure for informed consent as set forth in ***Sherwood v. Carter***, 119 Idaho 246, 256, 805 P.2d 452, 462 (1991). ***Sherwood*** states in relevant part:

[a] valid consent must be preceded by the physician disclosing those pertinent facts to the patient so that he or she is sufficiently aware of

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the need for, the nature of, and the significant risks ordinarily involved in the treatment to be provided in order that the giving or withholding of consent be a reasonably informed decision. The requisite pertinent facts to be disclosed to the patient are those which would be given by a like physician of good standing practicing in the same community.

Sherwood at 256, 805 P.2d at 462. See also **Anderson v. Hollingsworth**, 136 Idaho 800, 805 (2001).

In **Anderson**, the Supreme Court, again citing **Sherwood**, said that: "To prove [the element of] causation the plaintiff must show by a preponderance of the evidence that a prudent person in the patient's position would not have consented to the proposed procedure had full and adequate disclosure of the significant risks been made at the time consent was originally given . . . Thus, in order to prove causation [the patient] must show by a preponderance of evidence that a reasonable person would have chosen no treatment or a different course of treatment had he or she been adequately informed by the physician." **Anderson**, 136 Idaho at 805, 41 P.3d at 233. **See also Foster v. Traul**, 145 Idaho 24, 31 (2007).

In **Foster v. Traul**, 145 Idaho 24, 31 (2007), the Supreme Court recently set forth the required showing in order to prove the element of an injury:

To show injury, the plaintiff must prove his injuries were a direct and proximate cause of the defendant's failure to disclose risks and alternatives to the patient. The injury must be as a result of the undisclosed material risk, rather than some unrelated risk, such as falling off of the operating table or faulty work on the part of medical personnel not involved in anesthesia care. . . in order to establish the injury element the patient must show that the injury arose out of

a material risk of the surgery that should have been disclosed to him. It is irrelevant whether [the physician's] actions caused the injury. The question is whether [the physician's] failure to fully disclose risks and alternative treatments caused [the patient] to sustain an injury that is related to a material risk that the physician failed to disclose.

Foster v. Traul, 145 Idaho 24, 31 (2007).

With these three elements and their requirements in mind, we turn to the facts of this case. In their Complaint, the Plaintiffs allege that Defendants failed to disclose material facts necessary to allow Plaintiff Franz Suhadolnik to make a reasonably informed decision regarding the cataract surgery due to his prior use of the drug Flomax. **See Plaintiffs' Complaint** at para 6-8. In opposition to this claim, and in support of his pending motion, Dr. Pressman has opined in his Affidavit that he provided the patient with an appropriate informed consent consistent with each of the three requirements set forth above under Idaho Code §§ 39-4506 and 39-4507. **See Affidavit of Dr. Pressman** at para 3-5. Dr. Pressman's opinions, with supporting factual basis, are sufficient to shift the burden to the Plaintiffs to respond with an appropriate expert Affidavit that similarly meets the requirements of the statutes and case authorities set forth above.

Dr. Pressman's affidavit sets forth that the drug Flomax did not represent a material risk to the cataract procedure and as such Dr. Pressman was not required to inquire with the patient about prior use of the drug or advise as to any increased risk of complications associated with the drug's use. In addition, the deposition of Plaintiff Franz Suhadolnik confirms that he was not taking Flomax and had not taken the drug for weeks, if not months, prior to the cataract surgery on May 31, 2006. **See depo testimony of**

Plaintiff Franz Suhadolnik at p. 72, ll. 17 thru p. 75, ll. 2; p. 81, ll. 1-17; p. 82, ll. 9 thru p. 83, ll. 19, attached to the Affidavit of Counsel in Support of Summary Judgment as Exhibit A. Furthermore, the patient signed three different informed consent documents in this case. As outlined in the deposition of Plaintiff Franz Suhadolnik, he admitted that he read and signed each of the three separate informed consent documents in this case. **See** depo testimony of Plaintiff Franz Suhadolnik at p. 98, ll. 24 thru p. 100, ll. 10; p. 69, ll. 17 thru p. 70, ll. 16, Attached to the Affidavit of Counsel in Support of Summary Judgment as Exhibit A. **See** also signed informed consent documents attached to the Affidavit of Counsel in Support of Summary Judgment as Exhibits B, C and D. Pursuant to Idaho Code §39-4507:

“when the giving of such consent is recited or documented in writing and expressly authorizes the care, treatment or procedures to be furnished, and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is presumed to be valid for the furnishing of such care, treatment or procedures, and the advice and disclosures of the attending physician or dentist, as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient.”

Thus, the Defendants contend that the entire issue relating to Flomax is nothing more than a red herring and irrelevant to the issues in this case. In the absence of qualified expert opinion testimony sufficient to rebut the opinions advanced by Dr. Pressman, the Plaintiffs cannot, as a matter of law, establish a *prima facie* case on the issue of lack of informed consent. Under such circumstances, Defendants would, therefore, be entitled to summary judgment.

**IV.
CONCLUSION**

The Affidavit of Dr. Pressman establishes that his care and treatment of Franz Suhadolnik complied in all respects with the standard of health care practice applicable to him as a board certified ophthalmologist and cataract surgeon and that in his capacity as such he obtained a valid informed consent prior to performing surgery on May 31, 2006 to remove the cataract in the patient's right eye and replace it with an artificial lens. The obligation is now on the Plaintiffs to respond with appropriate admissible expert testimony in order to rebut the evidence before the Court and create an issue of fact. If the Plaintiffs should fail to present such a suitable, admissible expert Affidavit consistent with the requirements set forth above, then Defendants should be entitled to summary judgment as a matter of law as to all claims of the Plaintiffs.

DATED this 13th day of November, 2009.

CAREY PERKINS LLP

By




Terrence S. Jones, Of the Firm
Attorneys for Defendants
Scott H. Pressman, M.D. and The Eye
Associates, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2009, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Jarom A. Whitehead
PEDERSEN & WHITEHEAD
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, Idaho 83303-2349
Telephone (208) 734-2552
Attorneys for Plaintiffs
Franz Suhadolnik and Betty Suhadolnik

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 734-2772



Terrence S. Jones

RECEIVED

DEC 15 2009

Ada County Clerk
PEDERSEN and WHITEHEAD
Attorneys at Law
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, ID 83303-2349
208/734-2552

Attorney for: Plaintiffs

NO. _____
A.M. _____ FILED P.M. 4:02

DEC 15 2009

J. DAVID NAVARRO, Clerk
By REGGIE TOWNLEY
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT
H. PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

**PLAINTIFFS' DISCLOSURE OF
EXPERT WITNESSES**

TO: Defendants Scott H. Pressman, M.D., Scott H. Pressman, LLC, and The Eye Associates,
P.A., and their attorneys of record:

Pursuant to I.R.C.P. 26(b)(4), Plaintiffs, Franz Suhadolnik and Betty Suhadolnik,
individually, and as husband and wife, by and through their attorneys of record, Pedersen and
Whitehead, respectfully discloses the following expert witness testimony:

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A. Identity of Experts

The following persons have been retained or specially employed by Plaintiffs to provide expert testimony and may be called at trial to present evidence under Idaho Rules of Evidence 702, 703, or 705:

John D. Hofbauer, M.D.
416 N. Bedford Dr., Ste. 300
Beverly Hills, CA 90210
(310)273-2333

1. *Opinions held.* Dr. Hofbauer is a board-certified corneal specialist. It is anticipated that Dr. Hofbauer will testify that he has reviewed the relevant medical records, depositions, and party admissions in this case. Dr. Hofbauer is expected to prepare a report which is incorporated herein by reference. Dr. Hofbauer is expected to testify that based on the deposition of Dr. Pressman he is familiar with the local standard of care as it relates to the surgery at issue and for the relevant time period. Dr. Hofbauer will testify that the local standard of care required review of the patient's medical charts including taking an adequate medical history, understanding of and competency in performing the anticipated procedure, and taking into account the patient's known complicating factors including prior use of Flomax. The applicable standard of care also requires a surgeon to obtain informed consent on any procedure which would include advising the patient of any complicating factors, such as the use of Flomax, or preexisting retinal conditions that would increase the risk of an adverse outcome to a patient considering this surgery.

As part of his testimony Dr. Hofbauer will explain the significance of the drug Flomax to a cataract surgeon and possible complications. Dr. Hofbauer is anticipated to testify that in his opinion, on a more probable than not basis and to a reasonable degree of medical certainty, Dr. Pressman failed to take an adequate medical history or otherwise account for the prior use of

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Flomax which in some patients can cause the iris to become loose or “floppy” during cataract surgery. Dr. Pressman also failed to identify and inform Dr. Suhadolnik of a retinal condition that increased his risk of complications in the face of what amounted to an elective procedure. Dr. Hofbauer is expected to testify that during the May 30, 2006 cataract surgery Dr. Pressman most likely encountered a visual obstruction such as floppy iris that led to significant nasal zonular lysis with the capsule floating and vitreous in the wound. An anterior chamber intraocular lens was then misplaced by Dr. Pressman. Dr. Hofbauer is expected to testify that the surgical mistakes including misplacement of the lens were deviations from the applicable standard of care and substantial contributing factors in the need for subsequent surgery and loss of vision by Dr. Suhadolnik in his right eye.

2. ***Bases and reasons for opinions.*** Dr. Hofbauer will utilize his experience, training and expertise to provide some of the bases and reasons for his opinions. Dr. Hofbauer’s opinions are also based on his review of the relevant medical records and deposition testimony. As part of Plaintiffs’ disclosure it is anticipated that Dr. Hofbauer will testify consistently with his affidavit and deposition testimony, incorporated herein by reference.

3. ***Data or information considered by this witness.***

A. MEDICAL RECORDS

9-09-92 / 9-16-04	ST. LUKE’S WOOD RIVER INTERNAL MEDICINE Dan S. Fairman, M.D.
6-18-04 / 12-04-07	ST. LUKE’S WOOD RIVER FAMILY MEDICINE Richard F. Paris, M.D.
8-08-05 / 12-12-07	HAILEY EYECENTER Dr. Steven Snapp
10-31-05 / 10-06-06	EYE ASSOCIATES Scott H. Pressman, M.D.
5-30-06 / 5-31-06	EAGLE EYE SURGERY AND LASER CENTER

10-17-06

INTERMOUNTAIN EYE & LASER CENTER
Leo S. Harf, M.D.

11-15-06 / 4-23-09

UNIVERSITY OF UTAH
Moran Eye Center

B. DEPOSITION TESTIMONY

Deposition of Scott H. Pressman, M.D.

Deposition of Franz Suhadolnik

Deposition of Betty Suhadolnik

4. ***Exhibits to be utilized.*** All medical records related to the care and treatment of Franz Suhadolnik, depositions of Scott Pressman, MD, Franz Suhadolnik, and Betty Suhadolnik.

5. ***Qualifications.*** See the attached Curriculum Vitae.

6. ***Publications authored by this witness in the past ten (10) years.*** Publications authored by this witness, if any, are set forth in his Curriculum Vitae.

7. ***Compensation to be paid for this witness's testimony.*** See Dr. Hofbauer's Fee Schedule attached hereto.

8. ***Other cases in which this witness has testified during the past four (4) years.*** See Dr. Hofbauer's List of Testimony attached hereto.

In addition to those listed above, Plaintiffs may call as expert and/or fact witnesses in this case **any and all** physicians, nurses, healthcare providers or consultants who at any time provided care, treatment, advice or consultation to Franz Suhadolnik, including his treating physicians and/or all nurses or other staff who were involved in his care. To the extent treating medical professionals are expert witnesses, Plaintiffs expect those medical experts to testify to medical facts, consequences and causation regarding Franz Suhadolnik's injuries and any matter within the scope of their expertise. To the extent that such testimony is disclosed in records or communications of those professionals, please see the medical records or file of said

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professionals.

Discovery remains ongoing and there may be other persons not identified herein who may fall within the scope of this category. If such persons are identified, Plaintiffs reserve the right to seasonably disclose such persons and to call them as witnesses at the time of trial.

Plaintiffs reserve the right to call and hereby identify those individuals who may be qualified to render expert opinion testimony but have not been retained, including but not limited to investigating law enforcement officials, health care providers, government officials and other parties to this litigation.

Plaintiffs reserve the right to call any expert witness identified, named or called by Defendants as set forth in their discovery responses and expert witness disclosures. Plaintiffs also reserve the right not to call any of the persons listed above.

Any of the persons identified above may be called for purposes of rebuttal and/or impeachment.

Plaintiffs also reserve the right to seasonably supplement this list of rebuttal and/or impeachment witnesses.

DATED this 14th day of December, 2009.

PEDERSEN and WHITEHEAD

By 

Jarom A. Whitehead, ISB #6656
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Heather Bennett, a paralegal with the firm Pedersen and Whitehead, hereby certifies that on the 14th day of December, 2009, she caused a true and correct copy of the within and foregoing PLAINTIFF'S DISCLOSURE OF EXPERT WITNESSES, to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

Jeremiah A. Quane
Terrance S. Jones
QUANE SMITH
P. O. Box 519
Boise, ID 83701-0519

<input checked="" type="checkbox"/>	First Class Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Express Mail


Heather Bennett

CURRICULUM VITAE

Name: John D. Hofbauer, M.D.

Birthdate: [REDACTED]

Address: 416 N. Bedford Drive
Suite 300
Beverly Hills, CA 90210
(310) 273-2333

Citizenship: United States

College: 1967 - 1971

University of Chicago
Chicago, Illinois
Bachelor of Arts; Dean's List;
Summer ARVO Grant with
Dr. Jorge Fishberg at
Harkness Eye Institute

Medical School: 1971 - 1975

College of Physicians and Surgeons,
Columbia University; Physicians and
Surgeons Research Award 1975;
Department of Pathology Award 1972
and 1973; Class President 1971 - 1973

Internship: 1975 - 1976

Rotating Medical Internship at Harbor
General Hospital, Torrance, CA

Residency: 1976 - 1979

Montefiore Hospital and Medical Center,
Albert Einstein College of Medicine;
Chief Administrative Resident 1978

Fellowship: 1979 - 1980

Cornea and External Disease,
Jules Stein Eye Institute

Boards: 1980

American Board of Ophthalmology

Licenses: 1976

Diplomate of the National Board of
Medical Examiners

1976

New York State Medical License

1975

California State Medical License

Private Practice: 1980 - Present

416 N. Bedford Drive, Suite 300
Beverly Hills, CA 90210

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Clinical Professor:

Jules Stein Eye Institute
800 Westwood Plaza
Westwood, CA 90024

Director 1st Year Resident Surgical Training Program:

Jules Stein Eye Institute

Professional Organization Memberships:

1. American Academy of Ophthalmology
2. Los Angeles County Medical Association
3. California Cornea Society
4. Ocular Microbiology Immunology Group
5. Castroviejo Society of Corneal Surgeons
6. International Society of Refractive Surgery
7. Eye Bank Society Association
8. Board of Directors of California Association of Ophthalmology, 1991-1995
9. Board of Directors of California Museum of Ancient Art
10. Pediatric Keratoplasty Association
11. Medical Advisory Committee, Specialty Surgical Center

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Presentations:

1. "Workshop on Radial Keratotomy," Jules Stein Eye Institute, Ophthalmic Continuing Education, April 24, 1981.
2. "Medical Aspects of Disability," Medical Seminar, Administrative Law Judges, Los Angeles County, August 13, 1981.
3. "Cornea and External Disease," Jules Stein Eye Institute, Ophthalmic Assistant Course, March 1983.
4. "Surgical Correction of Refractive Error," California Optometric Society, Contact Lens Symposium, May 20, 1983.
5. "Corneal Surgery," Albert Einstein College of Medicine, New York, November 1983.
6. "Medical and Surgical Treatment of Cataracts," Optifair, Los Angeles, 1984
7. "Current Concepts in Corneal Surgery; Modern Cataract and Implant Surgery; Diagnosis and Treatment of Glaucoma," Optifair, Ophthalmology, San Francisco, September 1985.
8. "Complications of YAG Laser in the Anterior Segment," American Academy of Ophthalmology, San Francisco, September, 1985.
9. "Use of the YAG Laser in the Anterior Segment," American Academy of Ophthalmology, San Francisco, September, 1985.
10. "Refractive Surgery Update," American Friends of Israeli Optometry, November 1985.
11. "YAG Laser Techniques," Nevada Ophthalmological Society, February, 1986.
12. "Postoperative Astigmatism Management," Jules Stein Eye Institute, Postgraduate Seminar, April 1986.
13. "Mycobacterium Fortuitum Keratitis: A Case Report," Ocular Microbiology and Immunology Group, New Orleans, November 1986.
14. "Contact Lenses and Infection," "Glaucoma Update," "Ophthalmology Update," Optifair, Chicago, June 1986.
15. "Contact Lenses and Infection," "Glaucoma Update," "Ophthalmology Update," Optifair, Los Angeles, September 1986
16. "Contact Lenses and Infection," "Glaucoma Update," "Ophthalmology Update," Optifair, Miami, January 1987.

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Presentations, continued:

17. "Hibiclens Keratitis," American Academy of Ophthalmology, Dallas, November 1987.
18. Instructor, Refractive Surgery Course, International Society of Refractive Surgery, October 1991.
19. "Photorefractive Surgery," Excimer Laser Instruction Course, Cedars Sinai Hospital, Los Angeles, 1991.
20. "Ocular Emergency Medicine," Cedars Sinai Hospital, Los Angeles, 1991.
21. "Comparison of Excimer Laser Systems," International Society of Cataract and Refractive Surgery, San Diego, California, April 1992.
22. "Parchless Cataract Surgery," American Society for Cataract and Refractive Surgery, Seattle, May 8, 1993.
23. "Treatment of Red Eye," Cedars Sinai Medical Center, July 14, 1993.
24. "Combined Cataract and Glaucoma Surgery," Symposium on Cataracts, Jules Stein Eye Institute, October 23, 1993.
25. "Principles of Ophthalmic Practice," Cedars Sinai Medical Staff Seminar, August 19, 1994.
26. "Treatment of Dry Eyes," Los Angeles Chapter of the Sjogren's Foundation, September 24, 1994.
27. "Basic Rigid Gas Permeable Contact Lens Fitting" and "Basic Soft and Rigid Toric Contact Lenses," CLAO Regional Basic Contact Lens Seminar, University of California, Irvine, March 11, 1995.
28. "Surgical Correction of Refractive Error," Columbia University, College of Physicians and Surgeons, May 13, 1995.
29. "Ophthalmology for Primary Care Providers," Cedars Sinai Medical Staff Seminar, August 14, 1996.
30. "Dry Eyes," Los Angeles Chapter of the Sjogren's Syndrome Foundation, August 17, 1996.
31. "Phacotrabeculectomy," Endocapsular Phacoemulsification and Lens Implant Course, Jules Stein Eye Institute, September 13, 1997.
32. "Laser Vision Correction," Community Lecture Series, Cedars Sinai Hospital, May 18, 2000.

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Presentations, continued:

33. "A Survey of Anterior Segment Pathology," Optometric Continuing Medical Education, The Center for the Partially Sighted, May 17, 2003.
34. "Complications Management of Anterior Segment Surgery," Symposium, Jules Stein Eye Institute, Clinical and Research Seminar, May 20, 2006.
35. "Managing Infection, Inflammation and Pain in Cataract and Refractive Surgery," Allergan Symposium, May 24, 2006.

Publications:

1. Rootman, J., Hofbauer, J., Ellsworth, R., and Kitchen, D.: Invasion of the Optic Nerve by Retinoblastoma Clinicopathological Study. Canadian Journal of Ophthalmology 11: No. 2, 1972.
2. Rootman, J., Ellsworth, R., Hofbauer, J., and Kitchen, D.: Orbital Retinoblastoma A Clinicopathological Study. Canadian Journal of Ophthalmology 12: No. 4, 1977.
3. Henkind, P., and Hofbauer, J.: Clinical Signs in Ophthalmology, Published Quarterly by Alcon Products.
4. Hofbauer, J.: Where Does Bowman's Membrane End? Paper presented at National ARVO Meeting, Sarasota, Florida, May 5, 1978.
5. Hofbauer, J.: The Anatomy of the Cornea at the Limbus. Paper presented at the New York Academy of Ophthalmology, New York, May 15, 1978.
6. Hofbauer, J.: The Microbial Flora of Corneal Donor Material. Paper presented before the National Ocular Microbiology and Immunology Group, San Francisco, November 5, 1979.
7. Treese, M., Pettit, T., Foos, R., and Hofbauer, J.: Familia Nevus of Ota. Annals of Ophthalmology, Vol. 13, No. 7, July 1981.
8. Weissman, B., and Hofbauer, J.: Fitting Contact Lenses Following Corneal Transplantation. Optometric Monthly 73 (10): 562.
9. Pettit, T., and Hofbauer, J.: Dry Eye Syndrome: A case history and discussion of dry eye associated with Sjogren's Syndrome. Published by Merck-Sharp & Dohme, West Point, Pennsylvania, February 1981.
10. Hofbauer, J., and Pettit, T.: Dry Eye Syndrome: A case history and discussion of severe dry eye associated with cicatricial pemphigoid. Merck-Sharp & Dohme, West Point, Pennsylvania, November 1981.

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Publications, continued

11. Hoffer, K.J., Darin, J.J., Pettit, T.H., Hofbauer, J.D., Elander, R., and Levenson, J.E.: UCLA Clinical Trial of Radial Keratometry, preliminary report. *Ophthalmology* 1981;88:729-736
12. Hoffer, K.J., Darin, J.J., Pettit, T.H., Hofbauer, J.D., Elander, R., and Levenson, J.E.: Three years experience with Radial Keratometry: The UCLA Study, *Ophthalmology*, 1983; 90:627-636.
13. Weissman, B., Mondino, B., Pettit, T., and Hofbauer, J.: Corneal Ulcers Associated with Extended Wear Contact Lenses. *American Journal of Ophthalmology* 97: 496, 1984.
14. Mondino, B., Hofbauer, J., and Foos, R.: Mooren's Ulcer After Penetrating Keratoplasty. *American Journal of Ophthalmology* 103:53-56, January 1987.
15. Dugel, U.D., Holland, G.N., Brown, H.H., Pettit T.H., Hofbauer, J.D., Simons, K.D., Ullman, H., Bath, P., and Foos, R.Y.: *Mycobacterium Fortuitum* Keratitis. *American Journal of Ophthalmology*, 105:661-669, June 1988.
16. Phinney, R., Mondino, B., Hofbauer, J., et al.: Corneal Edema Related to Accidental Hibiclens Exposure. *American Journal of Ophthalmology*, 106 #2:210-215, August 1988.
17. Levenson, J., Hofbauer, J.: Case Reports / Problems with Punctal Plugs. Published by the American Medical Association / *Archives of Ophthalmology* 107 #4:493-494, April 1989.
18. Nordan, L., Hofbauer, J.: Astigmatism: Concept and Surgical Approach. *Surgical Rehabilitation of Vision: Chapter 23, pages 23.1 - 23.30, Lippencott* 1991.
19. Hofbauer, J., and Levenson, J.: Capsulorhexis for Cataract Extraction during Keratoplasty. *Cornea*, Vol 2, #3: 273, May 1992.
20. Maguen, E., Berlin, M., Hofbauer, J., Macy, J., Nesburn, A., Papaioannou, T., Salz, J.: Preliminary results of VISX excimer laser myopic photorefractive keratectomy at Cedars Sinai Medical Center. *Ophthalmic Technologies II, P Series, Vol. 1644: May 19, 21, 1992.*
21. Salz, J., Maguen, E., Macy, J., Papaioannou, T., Hofbauer, J., Nesburn, A.: One-Year Results of Excimer Laser Photorefractive Keratotomy for Myopia. *Refractive and Corneal Surgery*, 8:269-273, 1992.
22. Salz, J., Maguen, E., Nesburn, A., Warren, C., Macy, J., Hofbauer, J., Papaioannou, T., and Berlin, M.: A Two-year Experience with Excimer Laser Photorefractive Keratectomy for Myopia. *Ophthalmology* 1993; 100:873-882.
23. Hofbauer, J., Gordon, L., and Palmer, J.: Acute orbital cellulitis after peribulbar injection. *American Journal of Ophthalmology* 118 #3:391-392, September 15, 1994.

Publications, continued

24. Maguen, E., Salz, J., Nesburn, A., Warren, C., Macy, J., Papaioannou, T., Hofbauer, J., and Berlin, M.: Results of Excimer Laser Photorefractive Keratotomy for the correction of myopia. *Ophthalmology*, Vol. 101, #9, September 1994.
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27. Ye, P., Tang, K., Hofbauer, J., and Weissman, B.: A Case Report of Keratoconus With Regular Astigmatic Topography. *Eye & Contact Lens* 33(4): 203-206, 2007.
28. Tai, T., Aldave, A., and Hofbauer, J.: Keratoconus Associated with Corneal Stromal Amyloid Deposition Containing TGFBIp. *Cornea*. Accepted for publication on September 2, 2008.
29. Price, F., and Price, M.: DSEK What You Need To Know About Endothelial Keratoplasty. Chapter 9. ISBN: 978-1-55642-881-4. Slack Inc. 2009.

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John D. Hofbauer, M. D.
Tax I.D. # 95-3629192
416 N. Bedford Drive, Suite 300
Beverly Hills, CA 90210
(310) 273-2333 FAX (310) 273-6583

Contact person: Marina Rodriguez

Fee Schedule - Independent medical exam - may include any or all of the following:

1. Confirmatory consultation	- \$	450.00
2. Extensive ophthalmoscopy	-	85.00
3. Visual field test	-	180.00
4. Gonioscopy	-	60.00
5. Topography (per eye)		100.00
6. Optical Coherence Tomography (OCT) per eye		150.00
7. Refraction		60.00

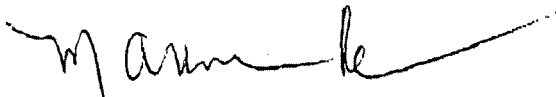
Ophthalmic Medical report	-	250.00
Review records per hour	-	600.00
Deposition per hour	-	850.00
Court appearance (1/2 day)	-	5000.00

A two-hour retainer may be requested.

The fees quoted are effective as of February 5, 2009 and are subject to change.

Attached is a copy of the current Curriculum Vitae. Please contact the office if you require further information.

Sincerely,



Marina Rodriguez

000096

(310) 273-2333 (310) 273-6583 FAX
 416 N. Bedford Drive, Suite 300
 Beverly Hills, CA 90210

Dr. Hofbauer was deposed, testified as an Expert, or served as a Neutral Medical Evaluator in the following legal cases:

Parties	Deposition	Trial Testimony	Case No.	Court or Administrative Agency	Defense, Plaintiff, or Neutral
Allen v. Grandon	07/01/05	None	04-05432NH	Circuit Ct. Oakland Co, MI	P
Ameter v. Grandon	09/13/00	None	CV98840-J	Houston Co., Alabama	D
Angelini v. Reversion	11/07/01	none	SC061397	L.A. Superior Court, Santa Monica, CA	D
Arsenian v. Nikou, MD	05/08/02	10/31/02	SC066085	L.A. Superior Court, Santa Monica, CA	P
Assor v. Bernard	02/22/00	none	LC045907	L.A. Superior Court, Los Angeles, CA	P
Bawa v. Garbet	09/10/02	09/21/02	BC238080	L.A. Superior Court, Los Angeles, CA	D
Berlin v. Kaiser	06/10/03	10/02/03	Arbitration Hearing	IVAMS, Pomona, Ca	D
Bisbee v. Charap	01/20/04	none	03C-CC02521	Orange Co. Superior Court, Central District, Calif.	D
Burrow v. Belville	06/16/05	07/12/05	04-CV-1415	District Court, Denver, CO	P
Calomino v. Caro, et al	09/23/05	none	02 L 004498	Circuit Court, Cook Co., Illinois	P
Choy v. Alamitos Med Center	10/2/07	Nonw	06CC07157	Superior Ct. of Orange Co., CA	D

Cofsky v. Goosey, et al	04/16/2001	None	2000-41623	Judicial District Ct., Harris Co., TX	P
Connett v. The Pep Boys, et al	None	11/07/97	MC 004-522	L.A. Superior Ct.	D
Cox v. Cooper, MD	11/03/09	None	CV 2008-052379	Mariposa Co., Superior Ct., AZ	P
Cruz v. Lodi	12/02/04	12/13/04	CV020824	San Luis Obispo Sup. Court, San Luis Obispo CA	P
Curley v. Crouch	06/20/01	None	3AN-97-8539 Civil	Superior Court Anchorage, AK	P
D'Amore v. Ritz	11/25/02	05/22/03	01CC16169	Orange Co. Superior Court, Central District, Calif	P
Dahlsten v. Co. of L.A. Pacific Bell	05/24/99	07/26/99	BC187546	L.A. Superior Court, Los Angeles, CA	P
Demma V. Caro	01/19/06	None	03L8683	Circuit Ct, Cook Co., Il, Co. Law Division	P
DeVleming v. Univ. of Washington Medical Center	02/12/04	None	032141933	King Co. Superior Court, Seattle Washington	P
Edmundson v. Inland	06/10/99	09/16/99	Unavailable	San Bernardino Superior Court, San Bernardino Co. Calif.	D
Feldman v. Kaiser	None	06/11/03	Arbitration hearing	JAMS/Endispute, Santa Monica, CA	D
Figueroa v. Robles	None	09/22/04	EC036459	Glendale Superior Court, Glendale, CA	P
Forsey v. Sherman Oaks Med Ctr, et al	None	09/26/06	LC 072602	Superior Court, Los Angeles Co. CA	D
Frye v. Sakamoto	01/29/01	03/06/01	BC217120	L.A. Superior Court, Los Angeles, CA	D

Galasso v. UCSD Med. Ctr, et al	09/12/07	11/05/07	GIC 860518	San Diego Superior Ct., California	P
George v. Simon, MD	09/09/09	None	CIV459149	San Mateo Co., Superior Ct. CA	P
Goldman v. Kaiser	05/22/02	05/31/02	Arbitration hearing	Judicate West, Los Angeles, CA	D
Gore v. Delaney	05/11/98	None	CV97-006311	Superior Court, State of Ariz, Maricopa Co.	P
Gotterbarm v. Group Health Cooperative	09/18/07	None	06-2-01436-6	Superior Ct., Yakima Co., Washington	P
Gregory v. Calais Apts.	05/10/95	04/10/97	YC 012 702	L.A. Sup.Ct., Torrance, CA	D
Griffin v. Home Depot	None	01/16/03	LC052726	L.A. Superior Court, West District, Van Nuys, CA	D
Griffin v. Netherly, et al	08/07/08	None	153-205501-04	Judicial District Ct., Tarrant Co., TX	P
Ho v. Advance	11/14/00	None	BC212991	L.A. Superior Court, Central District, Los Angeles, CA	P
Hoch v. TLC	12/09/02	None	CL0012280A0	Circuit Ct. of The 15 th Judicial Circuit, Palm Beach, FL	P
Jacob MD v. Penner MD	12/10/02	None	GIC774521	San Diego Superior Court, San Diego, CA	P
Jacobson v. Coral Tree Café	10/04/07	None	SC092329	Superior Ct of Los Angeles Co., CA	Non-Party Treating Physician
James v. Manthey	10/08/98	None	SC019356	Ventura Superior Ct, Simi Valley, CA	P
Johanson v. Ellison	04/07/03	10/08/03	2002CV-48094	Fulton Superior Court, Atlanta, GA, Civil Action	D

Johnson v. TLC, et al	05/31/08	None	CJ-2006-05086	Tulsa Co, Oklahoma	P
Jones v. Laser Eye	04/24/00	None	VC 214004	L.A. Superior Court, Los Angeles, CA	P
Kaarma v. University of Washington	12/13/04	None	032208892	King County Superior Court, Seattle, Washington	P
Kelsey v. Wong	03/15/02	None	YC037526	L.A. Superior Court, Torrance, CA	P
Kempe v. Barak	10/03/06	11/07/06	BC 329581	Superior Court, Los Angeles, CA	P
Kilfoy v. Nikash et al	03/01/05	None	03L 004825	Cook Co. Circuit Court, Law Div.	P
Klingen v. Dulaney	12/07/04	None	CV2004-001154	Superior Court, State of Ariz, Maricopa Co	P
Kong v. Mirage Casino	06/01/98	None	EC 081-837		D
Lee v. Wooh	05/24/02	None	EC029833	L.A. Superior Court, Los Angeles, CA	D
Leon v. Kasten	11/06/06	None	01-0567AO	Circ. Ct. of 15 th Judicial Circ., Palm Beach Co., FL	P
Leonis v. Kawesch, et al	09/12/06	None	1-04 CV-19042	Superior Court, Santa Ana Co., CA	D
Levy v. Holzman	10/18/00	None	184983	Fairfax Co. Circuit Court, Fairfax, VA	D
McGee v. Kaiser	11/05/02	11/11/02	Arbitration Hearing	3 member panel	D
Miller v. Greenwald	06/21/02	None	CIV202633	Ventura Superior Court, Ventura CA	D

Mite v. ISEC, Inc.	02/21/08		LAO 857893	Worker's Comp Appeals Board, State of CA Norwalk Superior Court, Norwalk, CA	Agreed Medical Examiner P
Molina v. Buchbinder	05/23/02	09/09/02	VC033196		
Mora v. Carpenter	09/15/05	11/14/06	A467975 Dept. XVIII	District Ct, Clark Co., Nevada	P
Navarro v. Premier Laser Sight	10/22/08	11/4/08	NC 037896	Superior Ct, Los Angeles Co. So. District, CA	D
Nyquist v. Miles, et al	05/20/05	09/28/05	CV20040327	Superior Court, Navajo Co. AZ	P
Ochoa v. Kaiser	06/27/05	06/30/05	Arbitration Hearing	Judicate West, Santa Ana, CA	D
Pardo v. Feliz Manufacturing Co.	02/16/06	None	0335685,86	State of Calif. Worker's Comp. Board	P
Parks v. Mason	01/29/04	None	2003-15346	269 th District Ct., Paris Co., TX	P
Plunkett v. Kaiser	02/28/02	None	Arbitration Hearing	OIA, Los Angeles, CA	P
Price v. Ruper	6/30/08	None	07CC08318	Orange Superior Ct, Orange County, CA	P
Rench v. Manthety	08/08/00	None	SC022937	Ventura Superior Ct., Simi Valley, CA	P
Rizk v. Virginia Mason Med Ctr, et al	12/15/07	None	06-2-18255-1 SEA	Superior Court, King Co. CA	P
Schwartz v. Frost	11/03/03	None	415569	San Francisco Superior Ct. CA	Neutral.
Shaw v. Kaiser Health Plans	12/07/06	None	N/A	Arbitration @ JAM, 707 Wilshire Blvd. LA, CA 90017	D
Shope V. Kamren	05/02/02	None	24-C-01-002507	Circuit Court for Baltimore Co., Maryland Civil Division	P

Spors v. TLC	01/25/05	None	03-2-40827-1SEA	King Co. Superior Court, Seattle, WA	P
Steck, et al, v. Cowden, et al	02/13/07	None	06-05520-NH	Circuit Court, Kent Co., MI	P
Stern v. Goltz	02/18/05	None	04-2-02131-6 SEA	Superior Ct. of Washington, King Co.	P
Tamini v. Laser Eye	07/26/00	None	BC211388	L.A. Superior Court, Los Angeles, CA	P
Tepper v. Kaiser	05/09/02	06/24/02	Arbitration Hearing	First Mediation, Encino, CA	P
Thomas v. Coffman, et al	07/19/07	none	2006-CA002399 MB	Circuit Ct., Palm Beach Co., FL	P
Thrall v. Neger	10/16/03	None	CGC02403270	San Francisco Superior Court, San Francisco, CA	P
Tuverson v. Powlowski	06/12/03	None	BC268541	L.A. Superior Court, Los Angeles, CA	D
Van Burgel v. Stahl	01/09/06	None	04CV1397	District Court, Boulder Co., Colorado	P
Vandenburg v. Honda	03/23/00	None	YC034354	L.A. Superior Court, Los Angeles, CA	D
Vogel v. Smith	11/14/02	11/18/03	CV2001004252	Superior Court, State of Ariz, Maricopa Co	P
Walton v. Lewis, et al	12/10/08	None	CV2007-001481	Superior Ct., Maricopa County, AZ	P
Wheeler v. Pacific Cataract & Laser	05/24/07	07/11/07	06-2-04131-3SEA	Superior Ct., King Co., WA	P
Wolfe v. Morton	04/23/07	None	06-2-04007-4SEA	Superior Ct., King Co., WA	P

Ysais v. Calvin	02/06/07	None	Arbitration	None	Non-Party Treating Physician
Zaval-Guevara v. Exercera, et al	04/30/08	None	0381871	Workers Comp Appeals Board, California	Agreed Medical Examiner
Zeller v. Nichols, et al	04/05/05	05/17/05	2003-CV-2539	District Court, Boulder Co., Colorado	P

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Ada County Clerk

PEDERSEN and WHITEHEAD
Attorneys at Law
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, ID 83303-2349
208/734-2552

Attorney for:

Plaintiff

NO.

FILED
P.M.

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DEC 24 2009

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiff,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendant.

Case No. CV PI 0808249

**PLAINTIFFS' SUPPLEMENTAL
DISCLOSURE OF EXPERT
WITNESSES**

TO: Defendants Scott H. Pressman, M.D., Scott H. Pressman, LLC, and The Eye Associates,
P.A., and their attorneys of record:

Pursuant to I.R.C.P. 26(b)(4), Plaintiffs, Franz Suhadolnik and Betty Suhadolnik,
individually, and as husband and wife, by and through their attorneys of record, Pedersen and
Whitehead, respectfully discloses the attached Affidavit of John D. Hofbauer, M.D., in

conjunction with his opinions previously disclosed in Plaintiffs' Expert Witness Disclosures, filed with the Court on December 15, 2009.

In addition to those listed above, Plaintiffs may call as expert and/or fact witnesses in this case **any and all** physicians, nurses, healthcare providers or consultants who at any time provided care, treatment, advice or consultation to Franz Suhadolnik, including his treating physicians and/or all nurses or other staff who were involved in his care. To the extent treating medical professionals are expert witnesses, Plaintiffs expect those medical experts to testify to medical facts, consequences and causation regarding Franz Suhadolnik's injuries and any matter within the scope of their expertise. To the extent that such testimony is disclosed in records or communications of those professionals, please see the medical records or file of said professionals.

Discovery remains ongoing and there may be other persons not identified herein who may fall within the scope of this category. If such persons are identified, Plaintiffs reserve the right to seasonably disclose such persons and to call them as witnesses at the time of trial.

Plaintiffs reserve the right to call and hereby identify those individuals who may be qualified to render expert opinion testimony but have not been retained, including but not limited to investigating law enforcement officials, health care providers, government officials and other parties to this litigation.

Plaintiffs reserve the right to call any expert witness identified, named or called by Defendants as set forth in their discovery responses and expert witness disclosures. Plaintiffs also reserve the right not to call any of the persons listed above.

Any of the persons identified above may be called for purposes of rebuttal and/or impeachment.

Plaintiffs also reserve the right to seasonably supplement this list of rebuttal and/or impeachment witnesses.

DATED this 22nd day of December, 2009.

PEDERSEN and WHITEHEAD

By



Jarom A. Whitehead, ISB #6656
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Heather Bennett, a paralegal with the firm Pedersen and Whitehead, hereby certifies that on the 22nd day of December, 2009, she caused a true and correct copy of the within and foregoing PLAINTIFF'S SUPPLEMENTAL DISCLOSURE OF EXPERT WITNESSES, to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

Jeremiah A. Quane
Terrance S. Jones
QUANE SMITH
P. O. Box 519
Boise, ID 83701-0519

<input checked="" type="checkbox"/>	First Class Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-Mail


Heather Bennett

PEDERSEN and WHITEHEAD
Attorneys at Law
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, ID 83303-2349
208/734-2552

Attorney for:
Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

**AFFIDAVIT OF JOHN D. HOFBAUER,
M.D.**

STATE OF CALIFORNIA)

: ss.

County of Los Angeles)

JOHN D. HOFBAUER, M.D., being first duly sworn upon oath, deposes and states:

1. I am a Board Certified Ophthalmologist. A copy of my current curriculum vitae is attached.

2. This Affidavit is based upon my review of the relevant medical records and testimony in this case, experience, and medical training. All of the opinions expressed in this Affidavit are given to a reasonable degree of medical certainty, by which I mean more probable than not.

3. Specifically, I have reviewed the following information:

- a) St. Luke's Wood River Internal Medicine medical records dated 9-9-92 through 9-16-04;
- b) St. Luke's Wood River Family Medicine medical records dated 6-18-04 through 12-4-07;
- c) Hailey Eye Center medical records dated 8-8-05 through 12-12-07;
- d) Eye Associates medical records dated 10-31-05 through 10-6-06;
- e) Eagle Eye Surgery and Laser Center medical records dated 5-30-06 through 5-31-06;
- f) Intermountain Eye & Laser Center medical records dated 10-17-06 ;
- g) University of Utah medical records dated 11-15-06 through 4-23-09;
- h) Deposition of Scott H. Pressman, M.D., taken September 30, 2009;
- i) Deposition of Franz Suhadolnik taken October 21, 2009; and
- j) Deposition of Betty Suhadolnik taken October 21, 2009.

4. Regarding the standard of care, I have taken into account the training, experience, and fields of medical specialization of Dr. Pressman.

5. I have actual knowledge of the standard of care as it existed in Boise, Idaho, during May of 2006 as it related to the provision of medical care to Franz Suhadolnik by Dr.

Pressman. My knowledge comes from my experience and training, as well as from the testimony provided by Dr. Pressman in his deposition and of the medical records of Franz Suhadolnik.

6. The standard of care for physicians such as myself and Dr. Pressman in Boise, Idaho in May of 2006 required, among other things, the following:

- (a) Keeping current with medical literature in our particular field of medicine.
- (b) Being aware of FDA advisories related to our field of medicine.
- (c) Understanding and being competent to perform the medical procedure.
- (d) Taking an adequate medical history of the patient.
- (e) Conducting a preoperative eye examination.
- (f) Advising the patient of risks and complications of the proposed procedure so that they can make an informed decision.

7. These standards of care are very basic standards for ophthalmologists. In my opinion the standards of care relevant to Dr. Pressman's treatment of Mr. Suhadolnik do not vary by locale and thus could be considered the same as national standards.

8. In my opinion the following breaches of the applicable standards of care occurred:

- (a) Dr. Pressman failed to take or review an adequate history concerning Mr. Suhadolnik's use of Flomax prior to the May 30, 2006 cataract surgery. In 2006 it was well known in the field that the prior use of Flomax has significance to patients considering cataract surgery as it was shown to increase certain risk factors. Dr. Pressman testified that he was aware of the increased risks posed by the use of Flomax prior to performing surgery in May of 2006. Mr. Suhadolnik's records indicate that Flomax had been prescribed and taken by him for a period of time prior to the surgery but

that he was not taking Flomax at the time of the surgery. Mr.

Suhadolnik's prior use of Flomax is also reflected in the pre-op exam report of Dr. Paris.

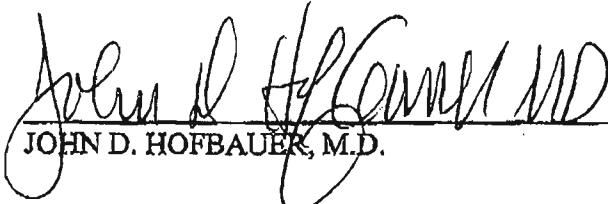
- (b) Dr. Pressman failed to identify an important preoperative condition in Mr. Suhadolnik, the epiretinal membrane on his retina. This epiretinal membrane predisposes a patient to retinal swelling and constitutes an important and additional risk factor when considering cataract surgery.
- (c) Dr. Pressman failed to discuss either the risks of having been on Flomax or the increased risks presented by the epiretinal membrane with Mr. Suhadolnik prior to the cataract surgery. Given Mr. Suhadolnik's pre-surgical acuity of 20/30, the increased risks of a poor outcome should have been presented to the patient.
- (d) Dr. Pressman also failed to account for the prior use of Flomax in this patient when performing the surgery. In patients who have taken Flomax it's very important to pre-treat with very strong dilators or to use intraoperative dilators in the eye to make the pupil stay dilated during the surgery. This is a relatively easy step and reduces the risks of complications during the surgery due to a floppy iris. The surgical records indicate that the pupil didn't behave in a normal manner suggesting the inability to see the anatomy clearly which resulted in massive trauma caused to the eye during the surgery.
- (e) Dr. Pressman then failed to adequately respond to the complication and misplaced the intraocular lens and tucked or cut the iris during the

procedure.

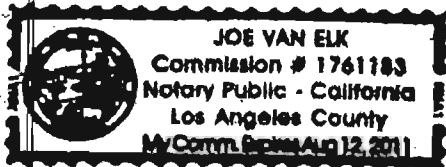
9. In my opinion the breaches of the standard of care were substantial contributing factors in the poor outcome and loss of vision in Mr. Suhadolnik's right eye in this case. The failure to account for the epiretinal membrane and prior use of Flomax resulted in surgical complications including massive trauma caused by Dr. Pressman during the May 30, 2006 procedure. This necessitated further surgery and correction including intraocular lens exchange, radial iris suture, pars plana vitrectomy, membrane peel and intravitreal kenalog.

10. All of these opinions are actually held by me and are testified to with reasonable medical certainty. The issues discussed are within my professional knowledge and expertise coupled with actual knowledge of the community standards of care as discussed previously in this Affidavit.

DATED this 21 day of December, 2009.


JOHN D. HOFBAUER, M.D.

SUBSCRIBED AND SWORN to before me this 21st day of December, 2009.



NOTARY PUBLIC
Residing at Beverly Hills, CA
Commission Expires: 8/12/2011

PEDERSEN and WHITEHEAD
ATTORNEYS AT LAW
161 5TH AVENUE SOUTH, SUITE 301
BOX 2349
TWIN FALLS, ID 83303-2349
PHONE 208/734-2532

CERTIFICATE OF SERVICE

Heather Bennett, a Paralegal with the firm Pedersen and Whitehead, hereby certifies that on the 22 day of December, 2009, she caused a true and correct copy of the within and foregoing AFFIDAVIT JOHN D. HOFBAUER, M.D., to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

Jeremiah A. Quane
Terrance S. Jones
QUANE SMITH
P. O. Box 519
Boise, ID 83701-0519

<input checked="" type="checkbox"/>	First Class Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	<i>Email</i>


Heather Bennett

PEDERSEN and WHITEHEAD
ATTORNEYS AT LAW
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PHONE 208/734-2552

NO. _____ FILED 445
A.M. _____ P.M.

DEC 29 2009

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

PEDERSEN and WHITEHEAD
Attorneys at Law
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, ID 83303-2349
208/734-2552

Attorney for:
Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

COME NOW the Plaintiffs, by and through their counsel of record, Pedersen and
Whitehead, and hereby files their Memorandum in Opposition to Defendants' Motion for
Summary Judgment.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT - 1

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I. INTRODUCTION

This is a medical malpractice case wherein Plaintiffs allege that Dr. Pressman negligently performed cataract surgery on Franz Suhadolnik and failed to give the appropriate informed consent resulting in pain and loss of vision in his right eye. The only element of Plaintiff's case assailed in the motion is whether plaintiffs can prove that Dr. Pressman failed to meet the local standard of care in this case. No other issues have been raised by this motion. As demonstrated herein below, Plaintiffs raise sufficient evidence of the existence of material issues of fact regarding the local standard of care to withstand the motion. Dr. Pressman admitted under oath to key local standards applicable to this case. Plaintiffs expert, Dr. Hofbauer, a board certified ophthalmologist has reviewed the local standard and gives his opinion that Dr. Pressman violated it by failing to account for Mr. Suhadolnik's prior use of Flomax, failing to diagnose a preexisting retinal condition that increased his likelihood of a poor outcome and when surgery was attempted in this case, negligently causing injury to the eye requiring additional surgery and treatment and causing loss of vision to the eye. Based upon the evidence and arguments presented herein, the motion should be denied.

II. STATEMENT OF MATERIAL FACTS

Franz Suhadolnik is a retired dentist, who live in Sun Valley, Idaho with his wife Betty. Deposition of Franz Suhadolnik, 19: 2 – 21, attached to the Affidavit of Terrence S. Jones as Exhibit A. In 2005, Franz had 20/30 vision, but was told that he was getting close to needing cataract surgery. *Id.* 42 : 5 – 43: 2; Affidavit of John Hofbauer, M.D, 4. Franz understood cataract surgery to be a low-risk procedure. Suhadolnik Dep. 42: 23 – 46: 2. In October, 2005, Franz met with Dr. Pressman for a surgery consultation. *Id.* 48 – 49. At the time of that visit,

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Franz was not on the prescription drug, Flomax. *Id.* 58 -59; Dr. Pressman's chart notes attached as Exhibit A to the Affidavit of Jarom A. Whitehead. Franz did not undergo surgery at that time and later in 2005, was put on Flomax by his primary physician. Suhadolnik Dep. 59 – 60. Prior to May, 2006, Franz elected to undergo the surgery and called Dr. Pressman's office to schedule the surgery. *Id.* 63 – 64.

Prior to the surgery, Franz stopped taking Flomax because he experienced numerous side effects. *Id.* 74. On May 25, 2006, Franz went to Dr. Paris for a preoperative exam. *Id.* 84 – 85; Dr. Paris chart notes attached as Exhibit B to the Affidavit of Jarom A. Whitehead. The report indicated that the patient had used Flomax. *Id.* On May 30, 2006, Franz went to the Eagle Surgery and Laser Center for his preoperative exam during which he answered the question regarding the medications he was currently taking. Eagle Eye Surgery and Laser Center chart notes, attached as Exhibit C to the Affidavit of Jarom A. Whitehead. The list of medications did not include Flomax because Franz had stopped taking Flomax at that time. *Id.*

Franz underwent surgery on May 31, 2006. After the surgery, Dr. Pressman came into Franz room and said, "We had a problem. And by the way, are you taking Flomax?" This was the first time that anyone had ever informed Franz that Flomax increased the risk of complications of cataract surgery. Suhadolnik Dep. 95: 23 – 96: 4. After Telling Dr. Pressman that he had previously taken Flomax, Dr. Pressman said, "I think that's our problem...But it will be okay. It will get better." *Id.* 102: 11-23.

Dr. Pressman did not take an adequate history or informed the Plaintiff of the increased risks associated with his Flomax use. Hofbauer Aff. 8. Dr. Pressman did not recognize that Franz was not a good candidate for cataract surgery because of the epiretinal membrane on his retina

that created additional risks of surgery. *Id.* Franz continues to suffer from impaired vision caused by the complications during the May 31, 2006, surgery.

III. ARGUMENT

A. The moving party is required to show there is no genuine issue of material fact in order to prevail on their motion.

A summary judgment is appropriate only where the record shows there is no genuine issue as to any material fact. I.R.C.P. 56(c). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 132 Idaho 559, 564, 976 P.2d 913 (1998).

“The purpose of summary judgment proceedings is to eliminate the necessity of trial where the facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.” *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896 (1984). In furtherance of this objective, a motion for summary judgment should only be granted, “if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). “All disputed facts are to be construed liberally in favor of the nonmoving party and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party.” *Idaho State Tax Commission v. Stang*, 135 Idaho 800, 802, 25 P.3 113 (2001).

B. At summary judgment the non-moving party is not required to respond to any element not challenged by the moving party in its motion.

“The party moving for summary judgment bears the burden of proving the absence of a

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genuine issue of material fact.” *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 175, 923 P.2d 416 (1996). Whether a fact is “material” depends on whether it is “one upon which the outcome of the case may be different.” *Petersen v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266 (1998).

If the moving party satisfactorily meets the burden then “the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact that would preclude summary judgment.” *Treasure Valley Gastroenterology Specialists v. Woods*, 135 Idaho 485, 488, 20 P.3d 21 (Ct.App. 2001). “If the basis of the motion is that no genuine issue of material fact exists with regard to an element of the nonmoving party’s case it is incumbent upon the nonmoving party to establish an issue of fact regarding that element.” *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908 (2001).

C. Proof required in a medical negligence case.

At trial, the Plaintiff in a medical malpractice case must prove by “direct expert testimony and by a preponderance of all the competent evidence” that the defendant breached the local standard of care. Idaho Code § 6-1012. The plaintiff must offer expert testimony indicating that the defendant health care provider negligently failed to meet the applicable standard of health care practice. In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by Idaho Code §6-1013. To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his expert opinion testimony is addressed. *Morris ex rel. Morris v. Thomson*, 130 Idaho 138, 937 P.2d 1212 (1997);

Rhodehouse v. Stutts, 125 Idaho 208, 868 P.2d 1224 (1994); *Dunlap ex rel. Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1994).

At summary judgment, the factors set forth in I.C. § 6-1012 merely act as elements of the plaintiff's cause of action and the analysis therefore is whether a genuine issue of material fact exists as to any element challenged by the defendant. In this instance Defendant Pressman has challenged Plaintiff's ability to prove a breach of the local community standard of care. The non-moving party is not required to respond to any element not addressed by the moving party at summary judgment. *Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 132 Idaho 559, 976 P.2d 913 (1998); *See also Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 663 (1997).

D. Foundation for expert testimony on the local standard of care.

Under Idaho Code §6-1012, a plaintiff in a medical malpractice action must show that the defendant negligently failed to meet the standard of health care for the particular time, community, and profession – the locality rule. Therefore, the expert's testimony must demonstrate that he familiarized himself with the standard of care for a particular defendant, whether that defendant be a doctor, nurse, hospital, anesthesia professional, or other health care worker. *See Dunlap*, 127 Idaho 599, 605, 903 P.2d 1296, 1302. Finally, the expert must state how he or she became familiar with the standard of care for the particular health care professional. *Rhodehouse*, 125 Idaho 208, 210-12, 868 P.2d 1224, 1226-28.

1. There is no "one way" to become familiar with the local standard of care.

As this is the only element of Plaintiff's case that has been called into question, the question of how an expert may become familiar with the local standard of care in this case is

extremely important. The Idaho Supreme Court has identified many ways in which an out-of-area expert may obtain sufficient foundation regarding the local standard of care. In fact, the Supreme Court has held that expert witnesses do not even have to be of the same medical specialty as the defendant physician. *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988); *Newberry v. Martens*, 142 Idaho 284, 287, 127 P.3d 187, 190 (2005).

An out-of-area physician may qualify under the statute by consulting about the local practice with one or more qualified local physicians. *Keyser v. Garner*, 129 Idaho 112, 922 P.2d 409 (Ct. App. 1996). However, consulting with local physicians is only one of many ways one can gain familiarity with the local standard of care. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000). In fact, the notion that only a local practicing physician can opine on the standard of care has been specifically rejected by the Idaho Supreme Court in *Grover v Smith*, 137 Idaho 247, 46 P.3d 1103 (2002). "This court has never held that an expert must speak with a professional who *practiced* in the same geographical area as the defendant to become familiar with the local standard of care." *Id.*, at 252, 46 P.3d at 110; Citing *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000) and *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

In *Newberry v. Martens*, 142 Idaho 284, 127 P.3d 187 (2005), the Idaho Supreme Court stated:

It is necessary for an expert testifying as to the standard of care to "state how he or she became familiar with that standard of care." *Dulaney*, 137 Idaho at 164, 45 P.3d at 820. Inquiring with a local specialist is "[o]ne method" an expert witness may obtain such knowledge, *id.*, but it is not the only method. Idaho Code §6-1013 requires that an expert witness must possess "actual knowledge" of the standard of care, but contrary to Dr. Martens' suggestion it does not dictate that such actual knowledge must in all cases be obtained by explicitly asking a specialist in the relevant field to explain the local standard of care.

In *Kozlowski v. Rush*, 121 Idaho 825, 828 P.2d 854 (1992) the Court found a physician was sufficiently qualified under the statute where the physician was certified in the same specialty as the defendant doctor, was familiar with the national standard of care at the time of the events in issue, and had read in a deposition of another doctor who was familiar with the local standard and stated that the standard of care for the Idaho community in question was the same as the national standard.

An expert may be able to rely on hospital policies and procedures, depositions, and even standard treatises in becoming familiar with the local standard of care. In *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000), the Court held that:

An expert's review of a deposition stating that the local standard does not vary from the national standard, coupled with the expert's personal knowledge of the national standard, is sufficient to lay a foundation for the expert's opinion.

Perry, 134 Idaho at 51-52, 995 P.2d at 821-22 (emphasis added). *Citing Kozlowski*, 121 Idaho 825, 828-29, 828 P.2d 854, 857-58.

In one example the Supreme Court recognized an expert can become familiar with the local standard of care by speaking with an out-of-state physician who has not even practiced in Idaho but received referrals from Idaho and had spoken to other Idaho surgeons in the past. *See Shane v. Blair*, 139 Idaho 126, 75 P.3d 180 (2003). In other words, an expert can become familiar with the standard of care in an area by talking to someone who never actually practiced in the area but learned the standard simply by accepting referrals and reviewing medical records that were generated in the area.

In *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1103, the Supreme Court recognized that some standards may be so "basic" that the local standard of care such as those governing the admission to practice may set the standard of care such that practitioners in a particular locality

may not create a lower standard. In *Grover* the defendant dentist was alleged to have failed to take an adequate history as part of the breach of the local standard of care. The District Court granted summary judgment because the plaintiff's expert had not learned the relevant standard of care from a dentist practicing in the same locality. *Id.* at 253, 1111. The Supreme Court, in reversing the grant of summary judgment stated:

The district court erred by finding Dr. Thurmond's testimony inadmissible. The district court misstated the test when it determined that Dr. Thurmond's opinion lacked adequate foundation because the dentists he spoke with had "never practiced general dentistry in the Idaho localities served by Holy Rosary Medical Center." This Court has never held that an expert must speak with a professional who *practiced* in the same geographic area as the defendant to become familiar with the local standard of care.

An examination of the wording found in I.C. §§ 6-1012, -1013 does not mandate the conclusion reached by the district court. Nothing in the language of either code section precludes an expert witness, when forming his opinion, from relying on a statewide standard of care that has been adopted by that profession's governing board.

Grover, 137 Idaho 247, 253, 46 P.3d 1103, 1111. (Emphasis in original).

The Supreme Court has also held that it is appropriate foundation for an expert to rely on hospital policies and procedures. *Sparks v. Saint Luke's Reg'l Med. Ctr. Ltd.*, 115 Idaho 505, 510, 768 P.2d 768, 772 (1982). Depositions citing specific standards and medical treatises can also be evidence of the standard of care. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

In cases involving unique specialties or small towns an out-of-state expert may be qualified without further inquiry where he's unable to familiarize himself with the standards by conversing with local physicians and "no similar Idaho communities" exist. *Hoene v. Barnes*, 121 Idaho 752, 828 P.2d 315 (1992). Finally, admissions by the defendant doctor concerning the

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local standard of care can lay adequate foundation for an out of area expert. See *Rhodehouse v. Stutts*, 125 Idaho 208, 212, 868 P.2d 1224, 1228 (1994) (stating that, although the reviewed deposition was defective, "it may be possible for an expert to become familiar with the local standard of care by reviewing the defendant doctor's deposition.").

E. Specifics of the applicable local standard of care were admitted to by Dr. Pressman in his deposition.

In his deposition Dr. Pressman was asked a series of questions regarding the local standard of care as it relates to board certified ophthalmologists practicing during the relevant time period. (See Deposition of Scott Pressman, M.D., attached to the Affidavit of Jarom A. Whitehead as Exhibit "D.") In addition to some basic standard of care questions, Dr. Pressman made the following admissions under oath regarding the local standard of care in Boise:

Q. Well, for example, would you say it's a standard practice to use sterile technique when you do an operation?

A. I would.

Q. Standard of practice to keep current on the medical literature in the field that you're in?

A. Yes.

Q. Now, I want to make sure we go back to we're here to talk about an operation that was performed on May 30th, '06. You're aware of that?

A. Correct.

Pressman Dep. 5: 2 - 14.

Q. Was it the standard of care then to know how to do a cataract surgery if you were going to do one?

MR. JONES: Object to form.

THE WITNESS: Certainly, there's a standard of practice. But again, I'm not quite sure what you mean by standard of care. Standard of practice, yes.

Q. (BY MR. PEDERSEN) You make a distinction between standard of care and standard of practice?

A. I do.

Q. What's the difference?

A. Well, the standard of practice is what is done locally in this community based on its resources, procedures that we have done in the community, the people in the

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community, the peer review. A number of things.

Pressman Dep. 6: 25 – 7: 17.

Q. (BY MR. PEDERSEN) Was it the standard of practice back in May of '03 in this community to take an adequate history before you did a cataract history?

A. In May of '03, yes.

Q. In May of '06.

A. Oh, in May of '06. Yes.

Q. Was it the standard of care to do an examination of the eye before you do a cataract surgery?

MR. JONES: Object to form.

THE WITNESS: The standard of practice was to do an exam preoperatively, yes.

Q. (BY MR. PEDERSEN) Was it the standard of practice to be acquainted with the manufacturer's information regarding drugs that you used?

A. I think that we are acquainted with that. But have we memorized them, no. But we are acquainted with different medications and their utilization, yeah.

Q. Was it the standard of practice to be acquainted with the medicines that you used?

A. Yes.

Q. All these questions relate to May of '06. Is that understood?

A. Okay.

Q. At that time, was it the standard of care to advise a patient of all the risks of a cataract surgery?

MR. JONES: Object to form.

THE WITNESS: Standard of practice is not to advise the patient of all possible risks.

Q. (BY MR. PEDERSEN) Was it the standard of practice to advise the patient of all known risks or all important risks?

A. No.

Q. There was some important risks that you didn't tell them about?

MR. JONES: Object to form.

THE WITNESS: The standard of practice is to inform the patient of the inherent risks of a procedure, alternatives, benefits. From my point of view, it's important to discuss goals and timing and let him make his own decision. Those risks are the major complications or significant risks that are present.

Q. (BY MR. PEDERSEN) And was it the standard of care to -- I asked you before generally. But at this time, was it the standard of care to keep current in the medical literature in your field?

MR. JONES: Object to form.

THE WITNESS: Standard of practice is, in the community, is to keep current on recent medical journals, yes.

Q. (BY MR. PEDERSEN) How did you go about doing that back in '06?

A. We subscribe to many medical journals. We make use of the library at Saint

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Al's primarily, although St. Luke's also. We attend continuing medical education courses. We talk to peers.

Q. Do you keep track of what the FDA says about drugs?

A. We are advised about those, yes.

Q. Was it standard of practice to pay attention to those?

A. Yes.

Pressman Dep. 8:4 – 10:22.

Dr. Pressman's testimony clearly indicates the local standard of care as it relates to cataract surgery such as at issue in this case.

F. Dr. Hofbauer has properly familiarized himself with the local standard of care in this case.

Dr. Hofbauer has testified that he has reviewed the deposition of Dr. Pressman and the medical records of Franz Suhaldonik, among other things, to reach his opinions. His opinions meet all other criterion set forth in I.C. §6-1013 for expert opinion in a medical negligence case.

(See Hofbauer Aff.)

G. Dr. Hofbauer has testified that Dr. Pressman breached the local standard of care by failing to take an adequate history, failing to inform the patient of the increased risks of surgery, and failing to take preoperative measures to maintain dilation in the pupil during surgery.

In his affidavit, Dr. Hofbauer has opined that the timing of the injections by Dr. Pressman in this case is not in fact incremental or slow, but that he gave the drug too rapidly under the circumstances.

8. In my opinion the following breaches of the applicable standards of care occurred:

- (a) Dr. Pressman failed to take or review an adequate history concerning Mr. Suhadolnik's use of Flomax prior to the May 30, 2006 cataract surgery. In 2006 it was well known in the field that the prior use of Flomax has significance to patients considering cataract surgery as it was shown to increase certain risk factors. Dr. Pressman testified that he was aware of the increased risks

posed by the use of Flomax prior to performing surgery in May of 2006. Mr. Suhadolnik's records indicate that Flomax had been prescribed and taken by him for a period of time prior to the surgery but that he was not taking Flomax at the time of the surgery. Mr. Suhadolnik's prior use of Flomax is also reflected in the pre-op exam report of Dr. Paris.

- (b) Dr. Pressman failed to identify an important preoperative condition in Mr. Suhadolnik, the epiretinal membrane on his retina. This epiretinal membrane predisposes a patient to retinal swelling and constitutes an important and additional risk factor when considering cataract surgery.
- (c) Dr. Pressman failed to discuss either the risks of having been on Flomax or the increased risks presented by the epiretinal membrane with Mr. Suhadolnik prior to the cataract surgery. Given Mr. Suhadolnik's pre-surgical acuity of 20/30, the increased risks of a poor outcome should have been presented to the patient.
- (d) Dr. Pressman also failed to account for the prior use of Flomax in this patient when performing the surgery. In patients who have taken Flomax it's very important to pre-treat with very strong dilators or to use intraoperative dilators in the eye to make the pupil stay dilated during the surgery. This is a relatively easy step and reduces the risks of complications during the surgery due to a floppy iris. The surgical records indicate that the pupil didn't behave in a normal manner suggesting the inability to see the anatomy clearly which resulted in massive trauma caused to the eye during the surgery.
- (e) Dr. Pressman then failed to adequately respond to the complication and misplaced the intraocular lens and tucked or cut the iris during the procedure.

(Affidavit of John Hofbauer, M.D., 8).

Plaintiff has offered evidence showing: (a) that such opinion is actually held by Dr. Hofbauer; (b) that his opinions are to a reasonable degree of medical certainty; (c) that as a board-certified anesthesiologist he possesses the requisite professional knowledge and expertise; and (d) that he possesses actual knowledge of the applicable community standard of care to

which his expert opinion is addressed.

Consequently there is a material issue of fact whether Dr. Pressman breached the local standard of care in caring for Franz Suhadolnik and that the breach resulted in his injuries.

Defendant's motion should be denied.

DATED this 29th day of December, 2009.

PEDERSEN and WHITEHEAD

By

Jarom A. Whitehead, ISB #6656
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Jarom A. Whitehead, an attorney with the firm Pedersen and Whitehead, hereby certifies that on the 29th day of December, 2009, he caused a true and correct copy of the within and foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

Terrence S. Jones
CAREY PERKINS
P. O. Box 519
Boise, ID 83701

☐ First Class Mail
☒ Hand Delivered
☐ Facsimile
☐ Express Mail

Jarom A. Whitehead

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DEC 29 2009

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

PEDERSEN and WHITEHEAD
Attorneys at Law
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208/734-2552

Attorney for:
Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiff,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendant.

Case No. CV PI 0808249

**AFFIDAVIT OF COUNSEL IN
SUPPORT OF MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

STATE OF IDAHO)
) : ss.
County of Twin Falls)

JAROM A. WHITEHEAD, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the firm of Pedersen and Whitehead. I am one of the attorneys of record on this case. As such, I am familiar with the facts of this matter and make this affidavit based on my own personal knowledge.

2. This Affidavit is made in support of Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment.

3. Attached hereto as Exhibit "A" is a true and correct copy of Eye Associates and Scott H. Pressman, M.D.'s medical records (bates nos. 000001-000006).

4. Attached hereto as Exhibit "B" is a true and correct copy of St. Luke's Wood River Family Medicine's and Richard F. Paris, M.D.'s medical records (bates nos. 000021-000022).

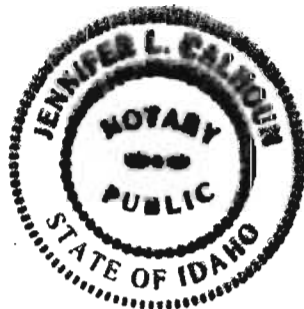
5. Attached hereto as Exhibit "C" is a true and correct copy of Eagle Eye Surgery and Laser Center medical records (bates nos. 000001-000009).

4. Attached hereto as Exhibit "D" is a true and correct copy of Scott H. Pressman, M.D.'s deposition transcript dated September 30, 2009.

DATED this 29th day of December, 2009.


JAROM A. WHITEHEAD

SUBSCRIBED AND SWORN to before me this 29th day of December, 2009.




NOTARY PUBLIC

Residing at Boise, Idaho
Commission Expires: 7/9/2014

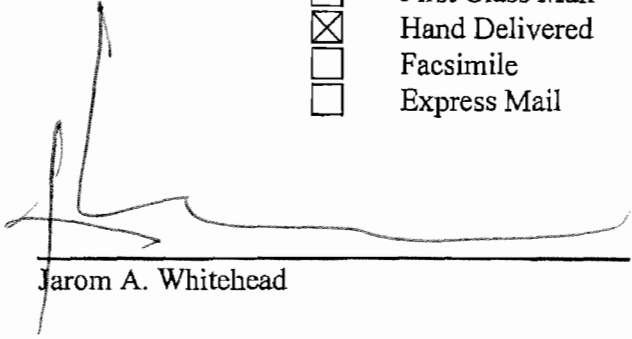
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CERTIFICATE OF SERVICE

Jarom A. Whitehead, an attorney with the firm Pedersen and Whitehead, hereby certifies that on the 29th day of December, 2009, he caused a true and correct copy of the within and foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

Terrence S. Jones
CAREY PERKINS
P. O. Box 519
Boise, ID 83701

<input type="checkbox"/>	First Class Mail
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Jarom A. Whitehead

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EXHIBIT A

000130

HISTORY: LEE 8/05		AGE: 71y	NAME: Franz, Fuchs d.m.k.	DATE: 10/31/0
C/O Blurred vision, Flashes?		B. DATE: 7/24/31	CONSULT FROM:	
Floaters + cbs - not sure which eye has floaters, but has had them for some time. Pt not happy w/ last exam new glasses didn't improve VA. Was told should see a specialist to Dis. NR -		PAST MED. Hx: HTN	MEDICATION: Lisinopril, Zolax	
more sensitive to sunlight over a period of time - trouble reading		PAST OC Hx: N/A	FAMILY Hx: N/A	
FIXATION	OD	VA	OD 30-2	OD 20/25 -
OS	distance	OS 25	near OS 20/25 -	RX OD +0.25 - 1.25 X 099
				OS +0.75 - 0.75 X 065
		add NEAR: c add		
W-4 dot D	STEREO	D	/5	fusional
N	N	Fly	/3	/9 amplitudes
Manifest OD	OTHER TESTS TA OD 15 @ 1:47 PM			
OS	OS 16 @ 1:48 PM			
cycloplegic OD	R control		Dil w M 1/2% OU @ 1:48 PM	
OS	Z control		Pupils PERRL - OU @ APD	
FUNDUS OD	DD	OS	EXTERNAL: Quiet, CF field	
H DMU + P		SLIT LAMP: C ✓ L ✓ AC ✓		
		1-2-3-4-5-6-7-8-9-10-11-12		
		PUD.		
		T/A 15/16		
IMPRESSION: Cat RYL				
PLAN: Disc RAB Goals Training				

000001

000131

From: Inhadolnik

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5-30-06

A. Kim

Pre-Op Phase c/10L 08

PSHX: None

Med:

* diet
unruined

No fam'ly of prob
a Anesthesia

form
Unruined

* Consent
signed

O.K. Lying flat

NKDA

Non-Smoker

BP 108/64

P 59

R.O.S. none

C. 8/10/60-2
50.

Chest - Dark op

COL SLE 2-30NS

L C A C I V

A)

P) Dm KAS each 2pt

D. Affected

ICL optics

5/31/06

RTIono e IOL

EG

(OST 2.1 @ 15%)

MODEL: MTA3U0

POWER: 20.5 D

LENGTH(Ø_T): 12.5mm

OPTIC(Ø_B): 5.5mm

SN: 850099.005

Alcon Laboratories, Inc.

EXP DATE
2009-07

UV



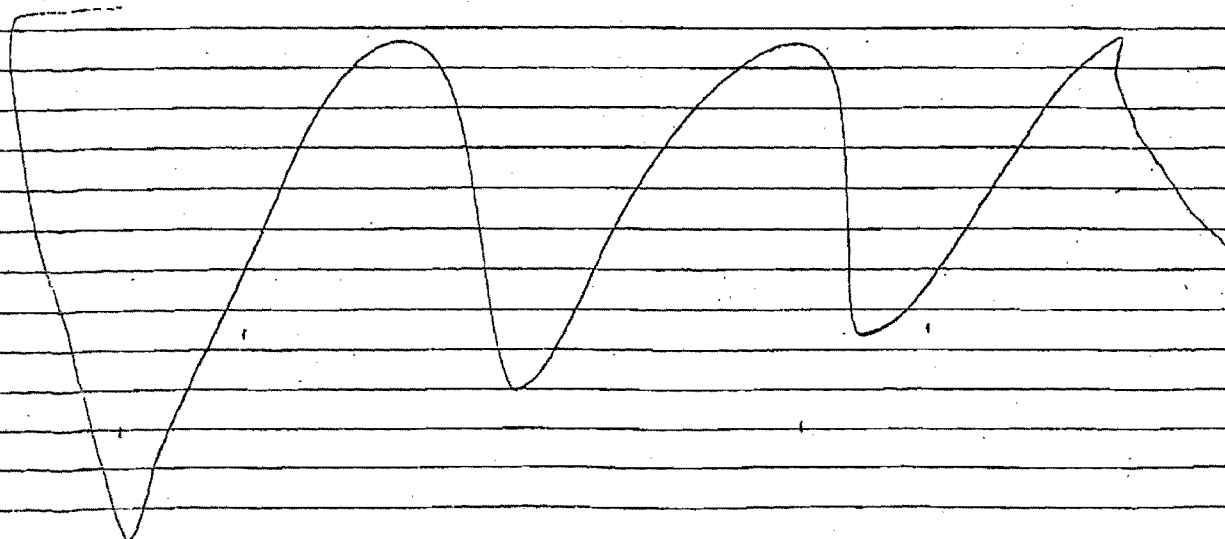
Signature

000002

000132

NAME Erang Suhadawant - Age 77-

ADDRESS

Idang P.O. PP ODDATE 10-1-06A. KernIV: Pt ischit pain (hotel)Flower x 5mNo pain. VA blurry.Patch just off.gets: 2/100PRRL @ APD0% floaters. No flashesNoneOD-dilatedpatch just offTA-15/SC LL✓ 20/50 PH NIQuietSLG: C-Subares ✓AC DeepAC IOL ✓Pupil (D) ? Tact.DID: A DMU-P. InidotoanyA) RP) Long Discussion Done0 R/B/G/OB etc Intis/GI/ROAC IOL.MR000000
000033

FRANK, Suhadalmik

06/08/06

Aug 74

LEB: 06/01/06

Hx: 1wk PD PTOLOD

OD

OD

V40/60

V50

cran out of Hauler -

eye field scratchy

Today

Not sure to 25-1254099

DVA SL

DVA PR

VH not clear

+075-075X067

OD surgical puped

Quiet

PRLOAPD

CF pull on

SLC C 10 clamp

+ folds

Tp 15 @ 11:11 AM

AC D+C

Wt

FOC

DID: HDMUP

A) PP OD 1

P) Disc above

PF > bid

A > bid
RTC SWK/PRH.

000004

000134

Franz Suhadolnik

DATE

6-29-06

LA Va / 80-2

SC

PH / 50-2

PC IOL OD 3wk

VA not as good as before

Surgery OD. Reflection w/ head lights. OD achieved

last spot from gHS BOP gave

TA 11:10A in office

GHS

PF bid

A bid > OD

Amulet #

SLG: Sutures / Iridial

Tucked AC D.K.

Q - 50-2.00X170 = 20/40+

A) ? M.I.D CME

B) Disc above

Glasses

R. CME

PF

A > B.D

6wk.

2.5 mos ACTOL OD ✓

08-28-06

LA Va / 400

SC Va / 40+

SC

PA / NI / 200 w/ time

VA & X biwk. Not gotten better

since surgery OD can't see as

well as OS. Like there is

something on IOL - haze +

filmy. Ran out of Actol

yesterday. D.P said he

had problem w/ surgery OD

Had to use old technique

w/ suture.

PF tid - 9.12

OD

AR - 025-125 M49

TA 12 @ 11:01A
DILMN @ 11:07A

700, 25-2.00X170 / 200+

extd C.S. Cont

SC - Coma - clus 0216

ACD 10

in tripod chaff

ACTOL OD

used tight suture intact

dilation

superior angle / epimeth

membrane

upper 1/2 also

A.P. Po CME - Xelium BID / PF Q day

4-6 wks

Dr. 000135

000005

Franz Schacholner

LEF 8/28/06
HX: CME

10/06/06

Aug 75

"looks like a
black smudge
over the EII"

not taken no A in
vision - seen
last visit - didn't
use any Pred Forte
after last visit

1/1/00 B7D
7/10/06
D/C Pred @
last visit

CC
V20/400
40
DVA

ph 20/200 - OD

A/R -025-125x161
+025-100x63

TA 16 @10:52

extd in @-2 den
CIS Out

SUE course - den 0510
NOD
no temporal piking
injection unchanged

1/2/MTNOD @10:52

A+P/A post op came out spiritual machine on
- init vision good
- with refer to EV post op
again on

A/C/M

000006

000136

EXHIBIT B

000137

Patient Chart

SUHADOLINK, FRANZ

1320192

Sex: M

Age: 76

Date Printed: 02/18/08

DOB: 07/24/1931

Progress Notes

05/25/06 : 11:49am

PRE-OP EXAM

RFP :

SUBJECTIVE:

This 74 yr old male presents for pre-operative medical examination for Cataract surgery scheduled by Dr. Pressman .

Date of surgery: 5/31/06.

Pertinent history: worsening visual sx related to cataracts and is now ready for surgery on right eye first.

Current Medications:

Rx: SIMVASTATIN 40MG 1/2TAB QHS - days, 60, Ref: 6

Rx: CYCLOCORT 60G - days, , Ref: 1

Rx: LISINOPRIL 10MG 1 TAB QD - days, 30, Ref: 6

Rx: FLOMAX 0.4MG 1 TAB QD - days, 30, Ref: 11

Allergies:

NKDA

Past Medical History:

MEDICAL:

No Chronic Medical Problems except possible arthritis.

Kidney stones 1990.

SURGICAL:

Tonsillectomy Procedure date 1933

Procedure date 1957 septa surgery

ACCIDENTS AND INJURIES: 1948 broken nose

Family History:

Mother: Died at age 40

Father: Died at age 70.

Brother: Alive and well with no medical problems

Sister: Alive and well with no medical problems

Diabetes: none

Heart Disease: none

Cancer: none

Respiratory Disease: none

Renal Disease: none

Kidney Stones: none

Arthritis: none

Epilepsy: none

Mental Illness: none

Congenital Illness: none

Social History:

Patient is married and lives with spouse in Sun Valley, Idaho.

Employment: retired

Environmental exposures: none

Smoking: former smoker quit 20 years ago

Patient Chart

SUHADOLINK, FRANZ

1320192 Sex: M Age: 76 DOB: [REDACTED] Date Printed: 02/18/08

Alcohol: abstains at this time one
Diet: special diet low fat
Exercise: regular (4 x a week or more) walking or other light activity
Recreational Activities: biking, walking

REVIEW OF SYMPTOMS:

Constitutional: no fatigue, weakness, fever, chills
Ears, Nose, Mouth, Throat: negative
Cardiovascular: negative
Respiratory: no dyspnea, wheezing, cough
Gastrointestinal: negative
Genitourinary: negative

OBJECTIVE:

Bp: 98/62, Pulse: 82
Temp: 97.6, Weight: 153
General: Well appearing, well nourished in no distress.
Head: normocephalic, atraumatic
Eyes: conjunctiva clear, sclera non-icteric, EOM intact, PERRL
Pharynx: mucosa non-inflamed, no tonsillar hypertrophy or exudate
Neck: supple, without lesions, bruits, or adenopathy, thyroid non-enlarged and non-tender
Heart: regular rate and rhythm w/o murmur, clicks or rubs.
Lungs: clear to auscultation
Neurologic: CN 2-12 normal. Sensation to pain, touch, and proprioception normal. DTRs normal in upper and lower extremities. No pathologic reflexes.

ASSESSMENT:

CATARRACTS
PRE-OPERATIVE EXAM : V72.84
HYPERTENSION, UNSPECIFIED : 401.9
HYPERLIPIDEMIA : 272.4

PLAN:

Because of low BP will decrease Lisinipril to 5 mg QD.
Patient is medically cleared for surgery as planned by Dr. Pressman

Rx: FLOMAX 0.4MG 1 TAB QD -, 30, Ref: 11

SIGNED BY RICHARD F PARIS (RFP) 05/25/2006 12:07PM

EXHIBIT C

000140

DATE: 05/30/06

EYE EXAM

Patient Name: Franz Suhadolnik
Date of Birth: 07/24/31

Last Complete Eye Exam 05/30/06

Last Dilation 5-30-06

Chief Complaint: hard to read

HPI ☒ Painless, progressive visual loss with lifestyle complaints of:
☒ Trouble driving ☒ day ☒ night ☐ Complaints of glare ☒ Trouble reading
☒ Trouble with near tasks ☒ Blurred Vision ☐ Color perception
☐ Other _____

POH ☐ Myopia ☒ Astigmatism ☒ Hyperopia
☐ ARMD ☐ Corneal Dystrophy ☐ Glaucoma ☐ OD ☐ OS
☐ Pseudophakia Date _____ ☐ OD ☐ OS
IOL Power _____ Previous IOL Calculation _____ Type _____

Pertinent Medical History ☐ Steroid use ☐ Diabetes ☐ Anticoagulants
☐ Trouble laying flat ☐ COPD ☒ B/P 108/64 Pulse 59

EXAM: Best corrected visual acuity

Distance	OD	<u>+1.25</u>	<u>-1.25</u>	X	<u>99</u>	20/	<u>30-2</u>
	OS			X		20/	
Near	OD	<u>+2.50</u>		X		20/	<u>25-</u>
	OS			X		20/	

Brightness Acuity Test

OD 20/ _____
OS 20/ _____

Keratometry

OD H	<u>42.62</u>	X	N	<u>42.12</u>	X
OS H	<u>42.50</u>	X	N	<u>42.75</u>	X

Tonometry OD 15 Confrontation Fields ☒ Normal OU
OS 16 Motility Exam ☒ Normal OU
Pupillary Exam ☒ Normal OU

Slit Lamp Exam

☒ Normal lids, lacrimal, lashes, conjunctiva, cornea, anterior chamber, iris ☒ OD ☒ OS
☐ Abnormal findings _____

Lens (1-4+)

OD	OS	
<u>2-3+</u>	+	Nuclear Sclerosis Cataract
+	+	Post Subcapsular Cataract
+	+	Post Cortical Cataract
+	+	Anterior Cortical Cataract
<input type="checkbox"/>	<input type="checkbox"/>	Intraocular Lens

Fundus (dilated)

☒ Normal Optic nerve, Macula, Vitreous Periphery ☒ OD ☐ OS
☐ Abnormal Findings: _____

Assessment

☒ Cataract with significant lifestyle complaints ☒ OD ☐ OS
☐ Risk, benefits, alternatives discussed including, but not limited to, loss of vision or eye
☒ Informed consent reviewed ☒ Cataract informed consent video seen ☐ Refused

Plan

☒ A-Scan with calculations
☒ Phacoemulsification with implantation of Intraocular Lens ☒ OD ☐ OS

Approach

☐ Scleral Tunnel Anesthesia: ☐ Retrobulbar
☒ Clear Cornea ☒ Topical
☐ General

Other: ☐ _____ ☐ _____

Signed



MD

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Eagle Eye Surgery and Laser C		Patient Name: <u>Franz Suhadolnik</u>	
Surgery Date: <u>05/31/06</u>		Date of Birth: [REDACTED]	
Primary Care Physician: <u>Richard Paris</u>		Doctors Phone Number: <u>Richard</u>	
		<u>(208) 788-3434</u>	
Medical History and Physical			
Please complete the following medical information including a brief explanation of any "yes" responses.			
Do you have: (check appropriate Yes/No response and circle all types that apply.)			Explain
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Blood pressure problems?	<u>controlled and</u>
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Heart Problems?	Types: Heart Attack, heart failure, chest pains, pacemaker, heart valve problems, other?
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Respiratory Problems?	Types: asthma, emphysema, sleep apnea, home oxygen ____ liters severe snoring, recent cold or cough, shortness of breath with exercise or lying flat
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Tobacco Use	Have you ever or do you currently use tobacco? Cigarette, cigar, chew If you quit, when? <u>20 yrs ago</u> Amount per day _____ # years used _____
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Thyroid/ Gland problems?	Type?
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Diabetes or blood sugar problems?	How is it controlled? Diet/exercise, oral pills, insulin
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Kidney or Bladder problems?	
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Frequent heartburn, ulcers or other stomach or esophagus problems?	
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Liver Problems?	Types: hepatitis, cirrhosis, other?
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Muscle or bone problems?	Type: neck problems, back problems, arthritis, osteoporosis, polio, fibromyalgia
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Neurological Problems?	Type: stroke, seizures, Parkinsons disease, headaches, nerve damage, MS
<input checked="" type="radio"/> Yes	<input type="radio"/> No	Clotting Problems?	Type: blood clots in legs or lungs? Use of blood thinners
<input checked="" type="radio"/> Yes	<input type="radio"/> No	(Females only) Is there a chance you could be pregnant?	Last menstrual period

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000142

Name <u>Franz Suhadolnik</u>				Page 2 of 2	
List all meds and dosages you use	Medication	Dose	Medication	Dose	
	<u>Zocor</u>	<u>20 mg</u>			
	<u>Lisinopril</u>	<u>5mg</u>			
List any allergies Include reaction to each.	Medication Allergy	Reaction	Food/Other Allergy	Reaction	
	<u>AKB/A</u>				
Previous Surgeries:		<u>None</u>			
<input checked="" type="checkbox"/> Signature of Parent or Guardian:		<u>Franz W. Suhadolnik</u>		Date <u>5-30-06</u>	
Following section for ophthalmologist use:			Following section for Anesthesia use:		
Height <u>5'10"</u> Weight <u>155</u> Actual / <u>Stated</u>			NPO since: <u>76h</u>		
<input checked="" type="checkbox"/> Yes	No	Age Appropriate behavior	Airway exam: <u>np. I</u>		
Heart			ECG or Lab results if clinically applicable		
<input checked="" type="checkbox"/> Yes	No	Regular Rhythm	ECG:		
Yes	<input checked="" type="checkbox"/> No	Murmur/rubs			
Lungs			Na+	K+	FBS Creat.
<input checked="" type="checkbox"/> Yes	No	Lungs Clear	Comments:		
Neuro			ASA Class: I <input checked="" type="checkbox"/> II III		
<input checked="" type="checkbox"/> Yes	No	Alert & Oriented x 3	Risks, benefits and options for anesthesia have been reviewed. Questions were answered. Patient wishes to proceed. (See detailed anesthesia consent)		
Comments:					
Surgeon Signature <u>[Signature]</u>			Anesthesia signature: <u>[Signature]</u>		
Date: <u>5-30-06</u>			Date: <u>5-30-06</u>		
History reviewed without changes			History reviewed without changes		
Surgeon Signature <u>[Signature]</u>			Anesthesia signature:		
Date:			Date:		

000143000000

SURGERY DATE: 05-31-2006
 PATIENT NAME: Franz Suhadolnik
 DOB: [REDACTED]

PREOPERATIVE DIAGNOSIS: Bilateral cataracts, right worse than left.
 POSTOPERATIVE DIAGNOSIS: Same.

PROCEDURE: Right phacoemulsification and posterior chamber intraocular lens
 implantation, OD. Ultrasonic time: 2.1 x 15%.

SURGEON: Scott H. Pressman, MD.

ASSISTANT: Dee Fischer, RN.

ANESTHESIA: Propofol, Versed, retrobulbar.

COMPLICATIONS: Zonular lysis and placement of anterior chamber intraocular lens
 +20.5.

DETAILS: The patient was brought to the operating room and placed under Propofol anesthesia and Versed. He was prepped and draped in the usual manner. A stab incision was made at about the 10 o'clock position. Following this, Lidocaine was injected into the anterior chamber. A keratome was used to enter the anterior chamber at about the 8 to 9 o'clock position. A circular capsulorhexis was carried out without complication. The lens was hydrodissected. Phacoemulsification was carried out without complication by quartering. Residual epinuclear material was removed with phacoemulsification. Irrigation/aspiration was then used to remove cortical material. After removal of the cortical material, it was noticed that there was a significant nasal zonular lysis with the capsule floating. Vitreous presented to the wound. This was cleaned with Weck-cells, following which a vitrectomy was carried out, along with removal of the posterior capsule. The excision was then extended. Viscoat was instilled into the anterior chamber. A Sheet's glide was placed across the iris. The +20.0 anterior chamber intraocular lens was then slid into position and wedged into the sulcus. Prior to this, white-to-white had been measured and found to be slightly larger than 11 mm. A 12.5 mm IOL was then placed. The Sheet's glide was removed. The incision was closed with running and interrupted 10-0 nylon sutures. The wound was hydrated. The wound was checked for vitreous material. It was noticed that there was a small sphincterotomy at the 9 o'clock position. It was felt that no further peripheral iridectomy was needed because of this. Vigamox and Maxitrol were applied to the eye. A pressure patch was applied. The patient was removed from the OR in good condition.


 SCOTT H. PRESSMAN, MD/lkb

000144 000004

EAGLE EYE SURGERY AND LASER CENTER
ORDERS

Surgeon Pressman, MD

Patient Name Fran, Schadolink

Surgery Date 05/31/06

Date of Birth 07/24/30 Age 76

Contact telephone number day of surgery 622-8920

Preoperative

- 1) Diagnosis: ☐ Cataract ☒ OD ☐ OS
☐ Other _____
- 2) Consent: ☐ Cataract Removal with Intraocular Lens OD eye
☐ Other _____
- 3) Start Saline Lock
- 4) Anesthesia: ☒ Topical ☐ Block ☐ General
- 5) Medications: Right eye
☐ Tetracaine 1% or Marcaine 0.75% 1 gtt first
☒ Formula 1
(Tetracaine 0.5% x 3, Mydracil 1% x 3, Neosynephrine 2.5% x 3, Voltaren x 2)
☐ Formula 2
(Marcaine 0.75% x 6, Cyclogyl x 3, Neosynephrine 2.5%,)
☐ Vigamox 1 gtt or Zymar 1 gtt
☐ Additional dilators as needed, per protocol
☐ Other _____
- 6) Diagnostics per anesthesia
- 7) Allergies ☒ NKDA ☐ Latex Allergy ☐ other _____

Signed [Signature] MD

Intraoperative

See Preference Card

- ☐ Alcon SN60AT ☐ Alcon SA60AT 225
☐ Alcon MA60AC ☐ Alcon SA60AC ☐ Other _____

Postoperative

- 1) DC IV when stable and taking fluids well
- 2) Acetaminophen or Ibuprofen 1-2 po prn pain
- 3) Routine Vital Signs
- 4) Meds:
- start drops at home per physician orders
☐ Zymar ☐ Vigamox
☐ Pred Forte ☐ Econo Pred
☐ Acular ☐ Voltaren ☐ Other _____
- 5) Discharge Orders
Give post-operative instructions and medications information to patient and family
Discharge with responsible adult when stable
Additional Orders: [Signature]

0000055
000145

NOTICE TO SURGERY PATIENTS

Patient Name: Franz Shadolnik Account Number: _____

We support the law which requires us to inform you that your physician has an ownership or financial interest in the ambulatory surgery center to which you have been referred. This law helps patients make reasoned financial decisions concerning their medical care treatment options and alternative health care providers.

Please be advised that the physician owners of *The Eye Associates* have an ownership interest in the Eagle Eye Surgery and Laser Center. Federal regulations provide that patients should be informed that the physicians' ownership interest in the ambulatory surgery center might create a potential conflict of interest. The surgical procedures that are recommended by *The Eye Associates* physicians could also be performed at other facilities in the area.

Please acknowledge that you have read and understand this disclosure by signing and dating this form in the space provided below.

ACKNOWLEDGEMENT

I HAVE READ THIS NOTICE and I understand the disclosure that it contains and acknowledge that I have received a copy.

DATED this _____ day of 05/30 2006Patient Signature X *Franz M. Shadolnik*Printed Name Franz ShadolnikWitness Signature *Alvin C. K.*000000
000146

Eagle Eye Surgery and Laser Center
3090 Gentry Way Suite 100
Meridian, ID 83642

Name: Franz Suhadolnik

DOB: 7-24-31

Cataract Operation, and/or Implantation of Intraocular Lens
and NA

This information is given to you so that you can make an informed decision about having eye surgery. You have the right to ask questions about any procedure before agreeing to have the operation.

Except for unusual problems, a cataract operation is indicated only when you cannot function adequately due to poor sight produced by the cataract. You must remember that the natural lens within your own eye with a slight cataract, although not perfect, has some distinct advantages over any man made lens.

After your doctor has told you that you have a cataract, you and your doctor are the only ones who can determine if or when you should have a cataract operation. This is based on your own visual needs, and medical consideration, unless you have an unusual cataract that may need immediate surgery.

CONSENT FOR YOUR OPERATION

In giving my permission for a cataract extraction and/or for the possible implantation of an intraocular lens in my eye, I declare I understand the following information:

1. Cataract surgery, by itself, means the removal of the natural lens of the eye by a surgical technique. In order for an intraocular lens to be implanted in my eye, I understand I must have cataract surgery performed either at the time of the lens implantation or before lens implantation. At the time of surgery, my doctor may decide not to implant an intraocular lens in my eye even though I may have given prior permission to do so.
2. When an intraocular lens is implanted, it is done by the surgical method. It is intended that the small plastic lens (with polypropylene or plastic supports) will be left in my eye permanently.
3. The results of surgery in my case cannot be guaranteed.
4. In the process of the surgery, my physician may deem it necessary to perform additional procedures. These may include but are not limited to using a capsular staining technique,

000147

performing a pupillary stretch procedure or choosing to provide a relaxing incision to correct astigmatism.

5. Complications of surgery to remove the cataract: As a result of the surgery, it is possible that my vision could be made worse. In some cases, complications may include hemorrhage (bleeding). Loss of corneal clarity, infection, detachment of the retina, glaucoma, and/or double vision. These and other complications may occur whether or not a lens is implanted and may result in poor vision, total loss of vision or loss of the eye.
6. Specific complications of lens implantation: Insertion of an intraocular lens may induce complications which otherwise would not occur. In some cases complications may develop days, weeks, months, or even years later. Complications may include loss of corneal clarity, infection, uveitis, iris atrophy, glaucoma, bleeding in the eye, inability to dilate the pupil, dislocation of the lens and retinal detachment.
7. At some future time, the lens implanted in my eye may have to be repositioned or removed surgically.
8. Complications of surgery in general: As with all types of surgery, there is the possibility of other complications due to anesthesia, drug reactions or other factors which may involve other parts of my body, including a possibility of brain damage or even death. Since it is impossible to state ever complications that may occur as a result of surgery, the list of complications in this form is incomplete.

The doctor has explained the basic procedure of cataract surgery, advantages and disadvantages, risks and possible complications and of alternative treatments. Although it is impossible for the doctor to inform me of every possible complication that may occur, the doctor has answered all my questions to my satisfaction and will answer any further questions I may have. In signing this information consent for the cataract operation with lens implantation of intraocular lens, I am stating I have read this informed consent (or it has been read to me) and I fully understand it and the possible risks, complications and benefits that can result from the surgery.

SUMMARY

I understand that if I give my consent, my doctor will surgically remove the cataract lens from my eye and/or implant an artificial lens in its place. However, at the time of surgery, my doctor may decide NOT to implant an intraocular lens, even though I have given permission to do so. I understand that complications can occur and that the results of my surgery cannot be guaranteed. I am aware that there are alternatives to having an artificial lens implanted, and these alternatives have been explained to me.

I agree to have a cataract operation with an intraocular lens implanted in my Right eye.

Patient Signature Mary M. Entablad Date 5-31-06

Witness' Signature Mary Ann


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000148

CONSENT FOR ANESTHESIA SERVICES

I Franz Suhadolnik, acknowledge that my doctor has explained to me that I will have an operation, diagnostic or treatment procedure. My doctor has explained the risks of the procedure, advised me of alternative treatments and told me about the expected outcome and what could happen if my condition remains untreated. I also understand that anesthesia services are needed so that my doctor can perform the operation or procedure.

It has been explained to me that all forms of anesthesia involve some risks and no guarantees to promises can be made concerning the results of my procedure or treatment. Although rare, unexpected severe complications with anesthesia can occur and include the remote possibility of infection, bleeding, drug reaction, blood clots, loss of sensation, loss of limb function, paralysis, stroke, brain damage, heart attack or death. I understand that these risks apply to all forms of anesthesia and that additional or specific risks have been identified below as they may apply to a specific type of anesthesia. I understand that the type(s) of anesthesia serviced checked below will be used for my procedure and that the anesthetic technique to be used is determined by many factors including my physical condition, the type of procedure my doctor is to do, his or her preference, as well as my own desire. It has been explained to me that sometimes an anesthesia technique which involves the use of local anesthetics, with or without sedation may not succeed completely and therefore another technique may have to be used including general anesthesia.

General Anesthesia	Expected Results	Total unconscious state, possible placement of a tube into the windpipe.
	Technique	Drug injected into the bloodstream, breathed into the lungs, or other routes.
	Risks	Mouth or throat pain, hoarseness, injury to mouth or teeth, awareness under anesthesia, injury to blood vessels, aspirations, pneumonia.
Monitored Anesthesia Care (with sedation) 	Expected Results	Reduced anxiety and pain, partial or total amnesia.
	Technique	Drug injected into the bloodstream, breathed into the lungs, or other routes producing a semi-conscious state.
	Risks	An unconscious state, depressed breathing, injury to blood vessels.
Monitored Anesthesia care (without sedation)	Expected Results	Measurement of vital signs, availability of anesthesia provider, injury to blood vessels.
	Technique	None.
	Risks	Increased awareness, anxiety and/or discomfort.

I hereby consent to the anesthesia service checked above and authorize that it be administered by OSPAS or his/her associates, all of whom are credentialed to provide anesthesia services at this health facility. I also consent to an alternative type of anesthesia, if necessary, as deemed appropriate by them. I expressly desire the following considerations be observed (or write "none") _____

I certify and acknowledge that I have read this form or had it read to me, that I understand the risks, alternatives, and expected results of the anesthesia service and that I had ample time to ask questions and to consider my decision.

OTHER CONSENTS:

Financial Agreement and Assignment of Benefits: I am financially responsible to Eagle Eye Surgery and Laser Center for all charges relating to this admission, and unless advance arrangements are made, I will fully pay my account upon billing. I assign to Eagle Eye Surgery and Laser Center any applicable insurance benefits to which I would be entitled. I authorize direct payment of such insurance benefits to Eagle Eye Surgery, and I will pay for any charges not covered by insurance. I will pay any legal fees incurred by Eagle Eye Surgery in collecting this account. Please initial FS

Medicare Patient Assignment of Benefits: I request that payment of authorized Medicare benefits be made either to me or on my behalf, to Eagle Eye Surgery for any services furnished to me by my physician. I authorize any holder of medical information about me to release to the Centers for Medicare and Medicaid Services and its agents any information needed to determine these benefits or the benefits payable for related services. Please initial FS

Health care Rights: I have received information regarding patient health care rights including the right to make Advance Directives. Please initial FS

Patient's signature

Date

Witness

Substitute signature

Relationship to patient

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000149

EXHIBIT D

000150

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and
BETTY SUHADOLNIK,
individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D.,
SCOTT H. PRESSMAN, M.D.,
a Limited Liability
Company, THE EYE
ASSOCIATES, P.A., an
Idaho Corporation, and
BUSINESS ENTITIES I
through X, and JOHN DOE
and JANE DOE, husband and
wife, I through X,

Defendants.

Case No. CV PI 0808249

DEPOSITION OF SCOTT H. PRESSMAN, M.D.

September 30, 2009

Boise, Idaho

Reported By:
Susan L. Sims, CSR No. 739

COPY

**ASSOCIATED
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DEPOSITION OF SCOTT H. PRESSMAN, M.D.

BE IT REMEMBERED that the deposition of SCOTT H. PRESSMAN, M.D. was taken by the Plaintiffs at the offices of Quane Smith, located at 101 S. Capitol Blvd., 16th Floor, Boise, Idaho, before Susan L. Sims, a Court Reporter (Idaho Certified Shorthand Reporter No. 739) and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 30th day of September, 2009, commencing at the hour of 1:01 p.m. in the above-entitled matter.

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I N D E X

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<p>1 PROCEEDINGS</p> <p>2</p> <p>3 SCOTT H. PRESSMAN, M.D.,</p> <p>4 a witness having been first duly sworn to tell the</p> <p>5 truth, the whole truth and nothing but the truth,</p> <p>6 testified as follows:</p> <p>7</p> <p>8 EXAMINATION</p> <p>9 BY MR. PEDERSEN:</p> <p>10 Q. Tell us your full name, please.</p> <p>11 A. Scott H. Pressman.</p> <p>12 Q. And where do you live?</p> <p>13 A. We live in several places, including</p> <p>14 Boise, Donnelly and Alaska.</p> <p>15 Q. What's your address here in Boise?</p> <p>16 A. 3620 Prospect.</p> <p>17 Q. And you're a physician?</p> <p>18 A. Correct.</p> <p>19 Q. What's your specialty?</p> <p>20 A. Ophthalmology.</p> <p>21 Q. And how long have you been in that</p> <p>22 specialty?</p> <p>23 A. Approximately 25 years, thereabouts.</p> <p>24 Q. Are you board certified?</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 4</p>	<p>1 yes.</p> <p>2 Q. Well, for example, would you say it's</p> <p>3 a standard practice to use sterile technique when</p> <p>4 you do an operation?</p> <p>5 A. I would.</p> <p>6 Q. Standard of practice to keep current</p> <p>7 on the medical literature in the field that</p> <p>8 you're in?</p> <p>9 A. Yes.</p> <p>10 Q. Now, I want to make sure we go back to</p> <p>11 we're here to talk about an operation that was</p> <p>12 performed on May 30th, '06.</p> <p>13 You're aware of that?</p> <p>14 A. Correct.</p> <p>15 Q. And my client and your former patient,</p> <p>16 Dr. Franz Suhadolnik, do you remember that</p> <p>17 patient?</p> <p>18 A. I do.</p> <p>19 Q. At that time, May 30 of '06, you were</p> <p>20 practicing in the Boise area?</p> <p>21 A. That's correct.</p> <p>22 Q. And you performed cataract surgery</p> <p>23 frequently at that time?</p> <p>24 A. Correct.</p> <p>25 Q. Was it the standard of care then to</p> <p style="text-align: right;">Page 6</p>
<p>1 Q. Do you do a surgery known as cataract</p> <p>2 surgery?</p> <p>3 A. Yes.</p> <p>4 Q. How long have you been doing that?</p> <p>5 A. For about 30 years.</p> <p>6 Q. I want to talk first of all about a</p> <p>7 concept known as standard of care.</p> <p>8 Are you familiar with that term? Do</p> <p>9 you use that term?</p> <p>10 A. I've heard people talk about it.</p> <p>11 Q. Are there certain standards that you</p> <p>12 that you adhere to in your practice?</p> <p>13 A. There are routines that we do.</p> <p>14 "Standards," you're going to have to define that</p> <p>15 a little bit for me.</p> <p>16 Q. Well, in my profession, we have</p> <p>17 standards related to the quality of our work. We</p> <p>18 have standards regarding how much research we</p> <p>19 should do. We have standards relating to telling</p> <p>20 the truth. We have a number of standards, and we</p> <p>21 just call them standards.</p> <p>22 A. I guess -</p> <p>23 Q. Do you have such a thing?</p> <p>24 A. We have standards of practice. I'm</p> <p>25 not sure that that's what you're meaning, but</p> <p style="text-align: right;">Page 5</p>	<p>1 know how to do a cataract surgery if you were</p> <p>2 going to do one?</p> <p>3 MR. JONES: Object to form.</p> <p>4 THE WITNESS: Certainly, there's a standard</p> <p>5 of practice. But again, I'm not quite sure what</p> <p>6 you mean by standard of care. Standard of</p> <p>7 practice, yes.</p> <p>8 Q. (BY MR. PEDERSEN) You make a</p> <p>9 distinction between standard of care and standard</p> <p>10 of practice?</p> <p>11 A. I do.</p> <p>12 Q. What's the difference?</p> <p>13 A. Well, the standard of practice is what</p> <p>14 is done locally in this community based on its</p> <p>15 resources, procedures that we have done in the</p> <p>16 community, the people in the community, the peer</p> <p>17 review. A number of things.</p> <p>18 Q. How does that differ from standard of</p> <p>19 care?</p> <p>20 A. Well, as I understand, standard of</p> <p>21 care is a legal technical term. Not being a</p> <p>22 lawyer, a trial lawyer, I'd just as soon avoid</p> <p>23 that.</p> <p>24 Q. Nobody's ever explained to you what</p> <p>25 standard of practice is?</p> <p style="text-align: right;">Page 7</p>

<p>1 MR. JONES: Object to form. 2 THE WITNESS: Standard of practice is set 3 in the local community, so it's what we practice. 4 Q. (BY MR. PEDERSEN) Was it the standard 5 of practice back in May of '03 in this community 6 to take an adequate history before you did a 7 cataract history? 8 A. In May of '03, yes. 9 Q. In May of '06. 10 A. Oh, in May of '06. Yes. 11 Q. Was it the standard of care to do an 12 examination of the eye before you do a cataract 13 surgery? 14 MR. JONES: Object to form. 15 THE WITNESS: The standard of practice was 16 to do an exam preoperatively, yes. 17 Q. (BY MR. PEDERSEN) Was it the standard 18 of practice to be acquainted with the 19 manufacturer's information regarding drugs that 20 you used? 21 A. I think that we are acquainted with 22 that. But have we memorized them, no. But we 23 are acquainted with different medications and 24 their utilization, yeah. 25 Q. Was it the standard of practice to be</p> <p style="text-align: right;">Page 8</p>	<p>1 Q. (BY MR. PEDERSEN) And was it the 2 standard of care to -- I asked you before 3 generally. But at this time, was it the standard 4 of care to keep current in the medical literature 5 in your field? 6 MR. JONES: Object to form. 7 THE WITNESS: Standard of practice is, in 8 the community, is to keep current on recent 9 medical journals, yes. 10 Q. (BY MR. PEDERSEN) How did you go 11 about doing that back in '06? 12 A. We subscribe to many medical journals. 13 We make use of the library at Saint Al's 14 primarily, although St. Luke's also. We attend 15 continuing medical education courses. We talk to 16 peers. 17 Q. Do you keep track of what the FDA says 18 about drugs? 19 A. We are advised about those, yes. 20 Q. Was it standard of practice to pay 21 attention to those? 22 A. Yes. 23 Q. Have you reviewed your records before 24 today before this deposition in preparation for 25 this deposition?</p> <p style="text-align: right;">Page 10</p>
<p>1 acquainted with the medicines that you used? 2 A. Yes. 3 Q. All these questions relate to May of 4 '06. Is that understood? 5 A. Okay. 6 Q. At that time, was it the standard of 7 care to advise a patient of all the risks of a 8 cataract surgery? 9 MR. JONES: Object to form. 10 THE WITNESS: Standard of practice is not 11 to advise the patient of all possible risks. 12 ↑ as it the standard 13 II known 14 15 risks that 16 17 18 of practice is 19 risks of a 20 21 from my point 22 of view, it's important to discuss goals and 23 timing and let him make his own decision. Those 24 risks are the major complications or significant 25 risks that are present.</p> <p style="text-align: right;">Page 9</p>	<p>1 A. Yes. 2 Q. Do you remember this patient? Do you 3 have a specific memory of him? 4 A. Yes. 5 Q. Now, you did a cataract surgery on 6 May 30 of '06 on this gentleman, correct? 7 A. I believe so. 8 Q. Were there any complications? 9 A. Yes. 10 Q. What were they? 11 A. During the procedure, near the end of 12 the procedure, in removing -- basically after the 13 cataract was removed, there was a dialysis of the 14 zonules, which hold the lens capsule in place. 15 And vitreous from the back of the eye presented 16 forward to the wound. 17 Q. Do you have an opinion whether that 18 was related to the use of Flowmax in any way? 19 A. I have an opinion, yes. 20 Q. What is your opinion? 21 A. My opinion is that there are many 22 factors involved with weakening of the zonules, 23 and Flowmax may well have been a contributing or 24 partially contributing factor. 25 Q. It's a known phenomenon, isn't it?</p> <p style="text-align: right;">Page 11</p>

5 (Pages 8 to 11)

1 A. To have dialysis of the zonules occurs
2 in people with various genetic problems, with
3 elderly people. There has been an association
4 that is rarely associated with Flowmax.
5 Q. What do you mean by "rarely"?
6 A. Rare.
7 Q. Well, I mean, how do you define rare?
8 A. Less than 1 percent.
9 Q. When did you first become aware that
10 Flowmax could – the use of Flowmax in a patient
11 could increase the risks of a complication during
12 cataract surgery?
13 A. Well, the first reported in a peer
14 review journal was in 2005. There were some
15 non-peer reviewed articles in the throwaway
16 journals that had talked about it. So in
17 approximately 2005, there was some early
18 indication that there were possible issues
19 related.
20 Q. Are there precautions that a person
21 can take, that a surgeon can take if he's aware
22 that a patient has taken Flowmax?
23 A. I think if a patient – if a physician
24 is aware that the patient is on Flowmax, it puts
25 him at higher risk of certain complications and

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1 take?
2 A. Basically, if the pupil is small, it
3 makes cataract surgery more difficult. So one
4 can use various types of pupil dilators
5 intraoperatively so that it's easier to do the
6 surgery.
7 Q. Before you retired – when did you
8 retire?
9 A. I believe in 2006.
10 Q. Before you retired and you were doing
11 cataract surgeries, and you were aware that a
12 patient was on – had taken Flowmax, what did you
13 tell a patient about Flowmax, if anything?
14 A. Well, the data was not very conclusive
15 in 2006. And I would have said something
16 general, such as, there is a slightly increased
17 risk of complications in people who are on
18 Flowmax.
19 Q. You would have said "slightly"?
20 A. Uh-huh.
21 Q. Was it the standard of care to say
22 "slightly"?
23 MR. JONES: Object to form.
24 THE WITNESS: I'm not aware of what the
25 standard practice in the community was for that

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1 problems. And if the physician is aware of that,
2 he can prepare more easily for that.
3 Only a small percentage of patients on
4 Flowmax have complications. And most patients
5 that we do surgery on, that's not an issue.
6 Q. Most patients who take Flowmax, it's
7 not an issue?
8 A. Right.
9 Q. Or most patients, it's not an issue?
10 A. Most patients on Flowmax. The
11 complication rate is very small.
12 Q. At the present time, do you go ahead
13 and operate on somebody, do a cataract
14 extraction, do a cataract surgery if you find out
15 he or she has been on Flowmax?
16 A. I'm retired, so the answer would be
17 no.
18 Q. At the time you retired, did you?
19 Before you retired, did you?
20 A. Operate on people with Flowmax?
21 Q. Yes.
22 A. Absolutely, sure.
23 Q. Did you take any precautions?
24 A. When they were indicated.
25 Q. Like what kind of precautions did you

Page 13

1 particular drug at that particular time. Because
2 as I said, the data on Flowmax was fairly recent
3 and was not conclusive at that time.
4 Q. (BY MR. PEDERSEN) Would you have
5 preferred – well, did you know that the patient
6 was on Flowmax at the time you started on my
7 client, when you started his surgery on May 30th,
8 '06?
9 A. No.
10 Q. And did you become aware of that at
11 some time on that day?
12 A. No.
13 Q. When did you first find out?
14 A. The day following.
15 Q. And how did you find out?
16 A. I specifically asked the patient
17 because of what appeared intraoperatively to be a
18 very loose, floppy iris that occurred, I asked
19 more specifically if the patient was on any
20 medications that might do that.
21 Q. Do you have a good recollection of
22 that?
23 A. Of talking to the patient?
24 Q. Yes.
25 A. Yeah, we had a very extensive

Page 15

6 (Pages 12 to 15)

<p>1 discussion. 2 Q. And it was the day following? 3 A. Uh-huh. 4 MR. JONES: Is your answer yes? 5 THE WITNESS: Yes. 6 Q. (BY MR. PEDERSEN) Is that the first 7 time it occurred to you that he may have had a 8 floppy iris due to Flowmax? 9 MR. JONES: Object to form. Lack of 10 foundation. 11 THE WITNESS: I'm not sure the floppy iris 12 was due to Flowmax, number one. Number two, 13 that's the first time that the patient stated 14 that he was on Flowmax, yes. 15 Q. (BY MR. PEDERSEN) If he testifies 16 under oath that during the surgery you asked him 17 if he was on Flowmax -- had taken Flowmax, would 18 you dispute that? 19 A. Yes. 20 Q. And say that he's not telling the 21 truth; that your recollection is different? Is 22 that what your testimony would be? 23 A. You need to understand that the 24 patient was under the effects of anesthetics and 25 medications that would suppress his memory and</p> <p style="text-align: right;">Page 16</p>	<p>1 A. Well, most of the note is in my 2 handwriting. This is in my handwriting. And 3 this is in my handwriting. 4 Q. So the top one third down to where it 5 says -- what is that word? 6 A. "Quiet." 7 Q. "Quiet"? 8 A. Uh-huh. 9 Q. So above "quiet," most of that is 10 somebody else's; correct? 11 A. Uh-huh. 12 MR. JONES: Is your answer yes? 13 THE WITNESS: Yes. 14 Q. (BY MR. PEDERSEN) And then your 15 handwriting over here, looks like it says 16 Flowmax, correct? 17 A. It does. 18 Q. And what does it say after that? 19 A. It says Flowmax times three months, 20 none times one month. 21 Q. So that says -- what did that mean? 22 A. Well, we -- those are short notes 23 indicating a discussion that we had with the 24 patient that was fairly extensive about the 25 complication that occurred during surgery and</p> <p style="text-align: right;">Page 18</p>
<p>1 alter his judgment. 2 Q. You read your record. I read it, too. 3 Does it say anything about Flowmax in your 4 record? 5 A. Yes. 6 Q. Where? 7 A. On the day postoperatively. 8 Q. Can you show me that in your record. 9 A. The date is 6-1-06. 10 Q. You don't have any page numbers? 11 A. No. 12 MR. PEDERSEN: Let's mark this as Exhibit 13 1. 14 (Deposition Exhibit No. 1 was marked.) 15 Q. (BY MR. PEDERSEN) Is it the one with 16 the squiggly line on it? 17 MR. JONES: Object to form. 18 THE WITNESS: Date is 6-1-06. 19 Q. (BY MR. PEDERSEN) Do you see the 20 squiggly line on there at the bottom? 21 A. Some would consider my writing 22 squiggly lines. Yes, I see some squiggly line, I 23 guess. 24 Q. Why don't you show me the part that is 25 in your handwriting.</p> <p style="text-align: right;">Page 17</p>	<p>1 some of the findings that we found during 2 surgery. 3 And during that long discussion, the 4 patient admitted that he had been on Flowmax for 5 approximately three months, but none since for 6 the last month prior to surgery. 7 Q. Are you saying he volunteered it? 8 A. I think I specifically asked him about 9 what medication, if he might be on an alpha 10 blocker. 11 Q. Would you say he finally admitted it? 12 A. Uh-huh. 13 Q. Do you think he was withholding that 14 from you on purpose? 15 A. We asked him multiple times what 16 medications he was on. And it was never 17 volunteered. 18 Q. And so you think he intentionally 19 withheld it from you? 20 MR. JONES: Object to form. Argumentative. 21 THE WITNESS: I have no idea what his 22 thinking was. 23 Q. (BY MR. PEDERSEN) When you say "we," 24 who are you talking about? 25 A. Myself and the office staff.</p> <p style="text-align: right;">Page 19</p>

7 (Pages 16 to 19)

1 Q. Well, specifically who?
 2 A. Well, when we first saw the patient,
 3 October 31st of 2005, I specifically asked him
 4 what medications he was on. He filled out a
 5 sheet listing his medications at that time. On
 6 each visit subsequently, he is asked about his
 7 medications. And that can be by staff, different
 8 technicians, or myself.

9 Q. Before the surgery started, did you
 10 personally ever ask him if he was on Flowmax?

11 A. I asked him what medications he was
 12 on.

13 Q. So the answer to my question is no?

14 A. Did I specifically ask him if he was
 15 on Flowmax? No, I did not.

16 Q. Do you have any knowledge of whether
 17 anybody in your office specifically asked him if
 18 he was on Flowmax?

19 A. I have no knowledge.

20 Q. Actually, your form asked what
 21 medications he's on, correct?

22 A. That is correct.

23 Q. It doesn't ask what medications he's
 24 been on?

25 A. Correct.

Page 20

1 Q. Did that ever change after this
 2 happened?

3 A. I retired, so I have no idea.

4 Q. You retired shortly after that?

5 A. Six weeks, eight weeks.

6 Q. Just a few weeks after that?

7 A. Six or eight weeks.

8 Q. Have you ever --

9 MR. JONES: I'm sorry, could you slow down.
 10 He wasn't done answering your questions.

11 THE WITNESS: Six to eight weeks.

12 Q. (BY MR. PEDERSEN) Have you ever asked
 13 anybody, your old partners or your old -- the
 14 doctors you used to work with if they changed the
 15 form?

16 A. I have not.

17 Q. Prior to this happening, were there
 18 any discussions among the doctors in your office
 19 about whether the form should be changed?

20 A. Not that I recall.

21 Q. Were there any discussions among you
 22 that you remember among you doctors between
 23 October of '05 and this surgery about Flowmax?

24 A. Oh, there were discussions about
 25 Flowmax, yes.

Page 21

1 Q. What were the nature of those, if you
 2 can tell me the best you can?

3 A. Well, it's almost four years ago.

4 MR. JONES: What specific time frame were
 5 you asking, Counsel?

6 MR. PEDERSEN: Between October '05 and this
 7 surgery in May of '06.

8 THE WITNESS: Well, that's almost four
 9 years ago, so my recollection of specific
 10 discussions would be very limited. I would
 11 generally state that this was a new possible
 12 correlation between -- and something of interest
 13 to ophthalmologists, but I really don't recall
 14 specific discussions.

15 Q. (BY MR. PEDERSEN) Did you have
 16 intra-office memos regarding these kinds of
 17 things? I mean, did you communicate with each
 18 other by e-mail?

19 A. Not that I'm aware of, no. Not
 20 typically.

21 Q. Within your own office, did you have
 22 continuing medical seminars? Did you do anything
 23 formally to keep current, I mean as group?

24 A. Not within the group, no.

25 Q. You went to seminars or medical

Page 22

1 conferences from time to time --

2 A. Correct.

3 Q. -- during this period of time? Do you
 4 have access to any records about which ones you
 5 would have gone to?

6 A. I probably have access to that.

7 Q. Are you aware of an October '05, Dear
 8 Doctor letter from the FDA regarding Flowmax and
 9 cataract surgery?

10 A. I believe I am, yes.

11 Q. Are you aware of whether or not it
 12 said that there was an increased risk of
 13 complications in cataract surgery for those
 14 patients who either were on or had previously
 15 taken Flowmax?

16 MR. JONES: I'm going to object to form.
 17 We don't have a document in front of us and the
 18 document speaks for itself.

19 MR. PEDERSEN: I'm trying to ask a question
 20 about his knowledge.

21 MR. JONES: I'm just --

22 MR. PEDERSEN: I'm just asking if --

23 MR. JONES: I think you're misstating the
 24 document.

25 MR. PEDERSEN: I just read it this morning.

Page 23

8 (Pages 20 to 23)

1 Q. (BY MR. PEDERSEN) But I'm just asking
2 you, were you aware of what it said?
3 A. You know, asking me to recall four
4 years ago, I don't recall.
5 Q. You haven't read it recently?
6 A. I've read a lot of stuff recently and
7 I don't recall if I read that specifically, no.
8 Q. Did you instruct your staff that they
9 should -- any time prior to this surgery we're
10 talking about, did you instruct them to be sure
11 to ask if they were on or ever had taken Flowmax?
12 A. That my staff was on or taken Flowmax,
13 no.
14 Q. No, the patients.
15 A. No.
16 Q. Okay. Why don't you read me your note
17 on this page for 6-1-06. You've read me the
18 Flowmax times three months, none times one month.
19 MR. JONES: So you're asking him to read
20 his portion of the entry?
21 MR. PEDERSEN: Yes.
22 THE WITNESS: And by that, you mean the
23 entire note or just what I read?
24 Q. (BY MR. PEDERSEN) Just what you
25 wrote.

Page 24

1 A. That the eye is quiet. The slit lamp
2 exam shows a healthy, normal cornea.
3 Postoperatively, the sutures were in good shape.
4 The anterior chamber was deep and clear. The
5 anterior chamber IOL was in good position and
6 quiet. The pupil was slightly oblong and there
7 was a -- some damage to the iris at approximately
8 9 o'clock position. And there is a question in
9 my mind that there may be a slight tuck of the
10 iris.
11 The dilated indirect exam was normal.
12 Showed a normal disk macular vessel and
13 periphery. The assessment, I can't read and I
14 don't remember what that -- I can't read it.
15 Plan, we had a long discussion about the
16 complication of surgery, the placement of the
17 anterior chamber lens. Flowmax. The risks,
18 benefits, goals, et cetera, that are inherent
19 with an anterior chamber lens and with a
20 complication, including iritis, glaucoma, retinal
21 detachment. And complications with an anterior
22 chamber intraocular lens.
23 Q. You weren't reading to me, I think.
24 You were telling me something. Your
25 recollection?

Page 25

1 A. No, I was reading my notes. And if
2 you would like it more specifically, I can say
3 quiet SLE:C, check, but --
4 Q. Yeah, would you do it like that, just
5 really slowly.
6 A. Okay. Quiet SLE:C, check, sutures,
7 check, AC Deep, AC IOL, check, pupil with a
8 drawing questionable -- or question mark, tuck.
9 A little line indicating iridotomy. DID:N/DMV
10 plus P. Assessment parentheses, and that's
11 illegible. P, parentheses, long discussion
12 above. RAB/goals, et cetera -- etc.
13 Iritis/GL/RD AC IOL, period. And that is my --
14 SHP is my initials.
15 Q. Do you have any other notes other than
16 these regarding this conversation?
17 A. No.
18 Q. Was anybody else present?
19 A. I don't recall.
20 Q. Was there any discussion about the
21 possibility or the advisability of his seeing a
22 specialist?
23 A. I am a specialist.
24 Q. Well, there are people who are more
25 specialized than you in this field.

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1 MR. JONES: Object to form.
2 Q. (BY MR. PEDERSEN) Aren't there?
3 A. In what field?
4 Q. Aren't there retinal specialists?
5 A. Yes.
6 Q. And are you a retinal specialist?
7 A. No.
8 Q. So you said you are a specialist?
9 A. I am.
10 Q. I gather from your answer you did not
11 talk to him about sending him to a specialist?
12 A. There were no retinal problems. There
13 was no indication to send him to a retinal
14 specialist.
15 Q. Let's start with the answer.
16 MR. JONES: Let him answer the question.
17 Q. (BY MR. PEDERSEN) Let's start with
18 the answer, Doctor. No, you did not, correct?
19 MR. JONES: Counsel, let him finish his
20 answer to your question before you start again.
21 I don't like you interrupting the witness.
22 MR. PEDERSEN: Well, I don't like him
23 giving me a different answer.
24 MR. JONES: Well, if you don't like his
25 answer, ask him a different question. But at

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1 least let him finish his answer so the record is
2 clear, please.
3 Q. (BY MR. PEDERSEN) Will you answer the
4 question about whether you sent him to a
5 specialist?
6 MR. JONES: He's answered that question.
7 THE WITNESS: Can you restate the question?
8 Q. (BY MR. PEDERSEN) Did you send him to
9 a specialist?
10 A. No.
11 Q. Did you talk about sending him to a
12 specialist?
13 A. I don't recall. I don't think so.
14 Q. You didn't write it down that you did,
15 correct?
16 A. Correct.
17 Q. What could happen with this
18 complication? What could have happened at that
19 point? Were you aware of what might happen from
20 the complication?
21 A. Which complication?
22 Q. Well, the one that happened during the
23 surgery?
24 A. Yes, I was aware.
25 Q. What were they? What were the

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1 possibilities?
2 A. There are numerous ones. And many of
3 them are listed here.
4 Q. Okay. Tell me what they are.
5 A. Okay. Long discussion about the above
6 problem. Complication with the patient to make
7 him aware that we did have a complication. We
8 had to change plan. And we talked about the
9 risks, alternatives, benefits, goals, et cetera.
10 Including risks of iritis, glaucoma, retinal
11 detachment and complications associates with the
12 anterior chamber intraocular lens.
13 Q. Do you remember anything else that you
14 told him?
15 A. Oh, these are notes. And so they are
16 a brief outline of the major points that we talk
17 about with a patient. But we probably spent half
18 an hour, 45 minutes discussing things with the
19 patient that day.
20 Q. Do you think I asked you how long?
21 The question was simply --
22 A. Okay. What was the question?
23 Q. What do you remember telling him?
24 A. My notes indicate that I covered those
25 issues.

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1 Q. And that's what you remember?
2 A. That and -- that is what I remember at
3 this time, yes.
4 Q. Let's go back to your previous note on
5 the page ahead of that.
6 MR. JONES: What's the date in the top
7 right-hand corner, Counsel?
8 MR. PEDERSEN: 5-30-06. And on Exhibit 1,
9 it's Bates page 2.
10 Q. (BY MR. PEDERSEN) What are we looking
11 at?
12 A. A chart note.
13 Q. Is there a part of it that you wrote?
14 A. Yes.
15 Q. Do you know who wrote the other part?
16 A. Alondra Kerr.
17 Q. Do you know where she is now?
18 A. I believe she's in Boise.
19 Q. Do you know if she still works for
20 this group?
21 A. I believe she does, but I don't know
22 that.
23 Q. Would you tell me where your
24 handwriting starts?
25 A. Where it says "light."

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1 Q. Was this preop or post-op?
2 A. This is preoperatively.
3 Q. Why don't you read me slowly what you
4 wrote?
5 A. What I wrote?
6 Q. Yes.
7 A. Light, 20-60 minus 2, 50. Chest,
8 check. CV, check. DR dark OU, SLE 2-3 plus NS.
9 L C A C I, check. A parentheses, P parentheses,
10 disk RAB goals, C with a line over it patient, or
11 PT, different IOL options.
12 Q. What was your -- what was the purpose
13 of the surgery?
14 A. To try to help the doctor see better.
15 Q. Remove the cataract?
16 A. Uh-huh.
17 MR. JONES: Is your answer yes?
18 THE WITNESS: Yes.
19 Q. (BY MR. PEDERSEN) Yes?
20 A. Yes.
21 Q. Put a lens in its place?
22 A. That was the goal.
23 Q. Where were you planning to put the
24 lens?
25 A. In the posterior chamber.

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10 (Pages 28 to 31)

<p>1 Q. Is that the usual place you do it?</p> <p>2 A. Yes.</p> <p>3 Q. Is that the preferable place?</p> <p>4 A. Yes.</p> <p>5 Q. If you'd have known he was on Flowmax,</p> <p>6 would you have treated him any differently?</p> <p>7 A. No.</p> <p>8 Q. It wouldn't have made any difference</p> <p>9 at all?</p> <p>10 A. He would have had the same surgical</p> <p>11 procedure, yes.</p> <p>12 Q. Would you have advised him that he was</p> <p>13 at increased risk?</p> <p>14 A. I would have advised him he had some</p> <p>15 increased risk, yes.</p> <p>16 Q. Are you aware of any medical</p> <p>17 literature regarding precautions that can be</p> <p>18 taken for patients who have taken Flowmax who are</p> <p>19 having cataract surgery?</p> <p>20 A. I am.</p> <p>21 Q. And there's a doctor in Utah who's</p> <p>22 published on this. Are you aware of that?</p> <p>23 A. No.</p> <p>24 Q. Are you aware of any precautions that</p> <p>25 can be taken for a patient who has taken Flowmax</p> <p style="text-align: right;">Page 32</p>	<p>1 will have restrictions to his ability to</p> <p>2 function.</p> <p>3 Q. Now, let's go to the fourth page of</p> <p>4 your record, 6-8-06.</p> <p>5 MR. JONES: That's page 4 of Exhibit 1,</p> <p>6 Counsel?</p> <p>7 MR. PEDERSEN: Yes.</p> <p>8 Q. (BY MR. PEDERSEN) Does your</p> <p>9 handwriting appear on this?</p> <p>10 A. Yes.</p> <p>11 Q. And can you read what you wrote?</p> <p>12 A. Quiet.</p> <p>13 Q. Where does it start? It starts at</p> <p>14 "Quiet"?</p> <p>15 A. Yep. SLE C, 1 plus edema plus folds,</p> <p>16 AC D plus C, vit, check, IOL, check, DID:N/DMV</p> <p>17 plus P. A parentheses PP OD. P, parentheses</p> <p>18 disc above, PF A bid, RTC 3 WK/pm. And my</p> <p>19 signature.</p> <p>20 Q. This is about one week post-op?</p> <p>21 A. Correct.</p> <p>22 Q. How was he done?</p> <p>23 A. His eye felt a little scratchy, but</p> <p>24 not sore. His vision was not as clear as he was</p> <p>25 hoping. And he had some, what we call, corneal</p> <p style="text-align: right;">Page 34</p>
<p>1 and is going to undergo or is undergoing cataract</p> <p>2 surgery?</p> <p>3 MR. JONES: Object to form.</p> <p>4 Q. (BY MR. PEDERSEN) Are you aware at</p> <p>5 the present time?</p> <p>6 A. Of precautions?</p> <p>7 Q. Yes.</p> <p>8 A. If certain problems occur during</p> <p>9 surgery, there are treatments that can be used to</p> <p>10 minimize risks, yes.</p> <p>11 Q. And can you be specific?</p> <p>12 A. Well, if the pupil, for instance,</p> <p>13 constricts to the point where one cannot see</p> <p>14 well, you can use iris hooks or a ring to expand</p> <p>15 the pupil.</p> <p>16 Q. Anything else?</p> <p>17 A. There are rings that can be used</p> <p>18 within the lens if the lens isn't stable. There</p> <p>19 are medications preoperatively that can be used</p> <p>20 that can dilate the pupil better if the pupil is</p> <p>21 not adequately dilated.</p> <p>22 Q. What was your anticipation or your,</p> <p>23 let's use your word here, goals for the surgery?</p> <p>24 A. Our goals are to have the patient's</p> <p>25 visual acuity improve so that he can -- no longer</p> <p style="text-align: right;">Page 33</p>	<p>1 edema and some folds. The anterior chamber was</p> <p>2 quiet. But how was he doing? The patient was</p> <p>3 doing reasonably well.</p> <p>4 Q. How was his visual acuity?</p> <p>5 A. A little better than it was</p> <p>6 preoperatively.</p> <p>7 Q. Do you remember anything about this</p> <p>8 visit other than what's in your note?</p> <p>9 A. No.</p> <p>10 Q. The next one I have is 6-29. Does</p> <p>11 your writing appear on this?</p> <p>12 A. Yes.</p> <p>13 Q. And where does it start?</p> <p>14 A. "SLE."</p> <p>15 Q. How about the line right above it?</p> <p>16 A. I don't see a line right above it.</p> <p>17 6-29-06?</p> <p>18 Q. This stuff here. Is this SLE you're</p> <p>19 talking about?</p> <p>20 A. That's not the date. You said</p> <p>21 6-29-06. That's August.</p> <p>22 Q. Oh, there are two or them there.</p> <p>23 A. Yes.</p> <p>24 Q. Does your handwriting appear on the</p> <p>25 6-29-06?</p> <p style="text-align: right;">Page 35</p>

11 (Pages 32 to 35)

1 A. Yes.
 2 Q. Oh, it starts here, SLE. Read it for
 3 me, will you?
 4 A. SLE: sutures, check, iris sl tucked AC
 5 D plus C, ansler n with a slash through it. M
 6 with some numbers. If you'd like me to read
 7 those, I will.
 8 Q. Yes.
 9 A. Minus 50 minus 2.00 times 170 equals
 10 2 - equals 20/40 plus. A parentheses, questions
 11 mild CME. P parentheses disk above, glasses RX,
 12 period, CME, arrow going up, PF A qid 6 WK.
 13 Q. How was he doing?
 14 A. He was doing pretty well, frankly, but
 15 not as well as I was hoping.
 16 Q. It says the nurse - do you call her a
 17 nurse, your assistant?
 18 A. Uh-huh.
 19 Q. Wrote VA not as good as before surgery
 20 OD.
 21 A. Uh-huh.
 22 Q. Does that mean the eye had the
 23 complication in, what, he couldn't see as well as
 24 before surgery?
 25 A. Uncorrected, yes, that's what the

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1 patient reported.
 2 Q. So he wasn't doing well?
 3 MR. JONES: Object to form.
 4 THE WITNESS: I disagree.
 5 Q. (BY MR. PEDERSEN) How was he doing
 6 well?
 7 A. Because he had correctable visual
 8 acuity with glasses to better than 20/40, to
 9 20/30 vision, which was twice as good as he was
 10 preoperatively.
 11 Q. Did he express to you in any respect
 12 he was not happy with the outcome at this date?
 13 A. Well, I don't have a direct
 14 recollection. The notes indicate that he has
 15 some reflection with headlights and that his
 16 right eye ached. Oh, I'm sorry, right eye ached
 17 from the last appointment from the eye drops that
 18 we had used. I apologize. I misspoke.
 19 Q. Is there anything else you remember
 20 about this?
 21 A. No.
 22 Q. Now we're to the 8-28. Why don't you
 23 read what the assistant said.
 24 A. 2.5 mos, ACIOL OD, check. VA arrow
 25 down times 6 weeks - Six WK, period. Not gotten

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1 better since surgery OD can't see as well as OS.
 2 Like there is something on IOL hazy plus filmy.
 3 Ran out of Acular yesterday. Dr. P said he had
 4 problem with surgery OD. Had to use old
 5 technique with suture.
 6 Q. You would be Dr. P?
 7 A. I would.
 8 Q. Do you remember a conversation with
 9 the assistant?
 10 A. None of that is in my handwriting. I
 11 did not see the patient that day.
 12 Q. Does your handwriting appear on that?
 13 A. No.
 14 Q. Is that a different physician?
 15 A. Yes.
 16 Q. Who is it?
 17 A. Dr. Kent.
 18 Q. You read each other's handwriting and
 19 notes?
 20 A. When we can.
 21 Q. Can you tell me what he's saying in
 22 this scratching, the best you can?
 23 A. You want his conclusion or do you want
 24 the entire note of his handwriting?
 25 Q. I want what you would make of this.

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1 A. In general, his vision had
 2 deteriorated. And it appeared from his exam that
 3 he had some cystoid macular edema. And his
 4 conclusion was that he had post-op cystoid
 5 macular edema or CME. And it looks like he
 6 changed his medications.
 7 Q. You use the term "cystoid macular
 8 edema." In laymen's terms, what's that?
 9 A. It's a very small amount of swelling
 10 in a very critical area which gives you your
 11 central visual acuity. And that causes a
 12 reduction in visual acuity.
 13 Q. Had you seen this before then?
 14 A. The exam before my assessment is
 15 questionable mild CME.
 16 Q. Do you have an opinion whether that
 17 could have been related to the complication at
 18 surgery?
 19 A. Yes.
 20 Q. What is your opinion?
 21 A. My opinion is that cystoid macular
 22 edema is very common postoperatively with any
 23 type of cataract surgery. It is more common with
 24 procedures where vitreous is lost.
 25 Q. Does that mean it could be related?

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12 (Pages 36 to 39)

1 A. Yes.
2 MR. JONES: Object to form.
3 Q. (BY MR. PEDERSEN) Did you ever see
4 that phenomenon in his eye before the surgery?
5 A. On the patient's eye?
6 Q. Yes.
7 A. This patient?
8 Q. Yes.
9 A. No.
10 Q. Do you understand -- can you explain
11 the mechanics of how the loss of vitreous results
12 in this problem with the macula?
13 A. Cystoid macula edema is a, again,
14 small amount of swelling that often occurs after
15 any invasive operation on the eye. And that
16 causes the cones in the macular area to separate
17 with the swelling so that they don't function as
18 well.
19 Q. There's an increased risk with the
20 loss of vitreous?
21 A. Yes.
22 Q. Do you have an opinion whether his
23 loss of vitreous as a complication of the surgery
24 you did for him played a significant role in his
25 problems with his macula?

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1 A. I think there are multiple reasons for
2 it that play a role.
3 Q. Okay. Now, let's see. The next one
4 is October 6. Can you read what the assistant
5 said?
6 MR. JONES: You mean the whole thing or
7 just that middle paragraph?
8 MR. PEDERSEN: Yeah, middle. Well, as far
9 as the writing right there in the middle.
10 THE WITNESS: That little paragraph in
11 there?
12 Q. (BY MR. PEDERSEN) Yeah.
13 A. Looks like a black smudge. Patient
14 states no delta, change, in vision since last
15 visit. Didn't use any Pred Forte since last
16 visit.
17 Q. What's Pred Forte?
18 A. Pred Forte is a cortisone medication
19 which is used to reduce swelling and inflammation
20 within the eye.
21 Q. Is it topical or --
22 A. Correct.
23 Q. What did you make of his reporting
24 that looks like a black smudge over the -- would
25 that be eye, E?

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1 A. Again, this is not my exam and I did
2 not talk to the patient at that time. So it's a
3 little hard for me to tell you for sure what he
4 meant by that.
5 Q. So another physician saw him?
6 A. Yes.
7 Q. Same one who saw him the time before?
8 A. Correct.
9 Q. And who is that?
10 A. Dr. Kent.
11 Q. Is he still practicing?
12 A. Yes.
13 Q. You never saw this patient again
14 after -- when was it? When is the last time you
15 saw him?
16 A. Approximately six weeks
17 postoperatively, I think, somewhere in there. It
18 was June 29th.
19 Q. Is that because you retired?
20 A. I left the practice between the time
21 of June 29th and August 28th, yes. And I
22 don't --
23 Q. Just retired altogether?
24 A. I retain my license.
25 Q. Do you still practice?

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1 A. Not ophthalmology.
2 Q. What do you practice?
3 A. Currently, I am doing consulting work
4 and mission work.
5 Q. What kind of consulting work?
6 A. Office management.
7 MR. PEDERSEN: Let's make this No. 2.
8 (Deposition Exhibit No. 2 was marked.)
9 Q. (BY MR. PEDERSEN) Here's the chart
10 from the surgery center. We're going to call
11 that No. 2.
12 Now, the Eagle Eye Surgery and Laser Center
13 in October or May of '06, in May of '06 when you
14 did the surgery, what was your relationship to
15 this surgery center?
16 A. I had a business relationship with the
17 surgery center. And it was where a significant
18 number of my surgeries were done.
19 Q. Were you a part owner?
20 A. Yes.
21 Q. How many owners were there?
22 A. I believe eight at the time.
23 Q. Did you sell that interest after that,
24 sometime after that?
25 A. Yes, yes.

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1 Q. You don't own it now?
2 A. No.
3 Q. Let's go to your note, which is the
4 fourth page, your surgical note. Operative note.
5 And just to make sure I've got this note, and
6 it's typewritten so it's pretty easy to read.
7 There's nothing in here about Flowmax,
8 correct?
9 MR. JONES: Object to form.
10 THE WITNESS: Yes.
11 Q. (BY MR. PEDERSEN) And also from your
12 previous question, am I correct that it did not
13 occur to you on this date that it could be
14 related to Flowmax?
15 MR. JONES: That what object to form.
16 Q. (BY MR. PEDERSEN) The complication?
17 A. Can you restate the question?
18 Q. I'll just ask it again. Then there's
19 nothing in the note about Flowmax?
20 A. Correct.
21 Q. Is it true that it did not occur to
22 you on that date that it could be -- that the
23 complication could be related to Flowmax?
24 A. No.
25 Q. It wasn't until yesterday or, I mean,

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1 the day following when you found out that he was
2 on Flowmax?
3 A. That is correct.
4 Q. Did you talk to anybody, another
5 physician between the time of the surgery and the
6 time you talked to my client about this
7 complication and Flowmax?
8 A. I have no recollection.
9 Q. Did you call -- you don't remember
10 whether you called on the phone?
11 A. No.
12 Q. Do you remember whether or not you
13 called somebody on the phone during the surgery?
14 A. No.
15 Q. You could have, you don't remember?
16 A. That's four years ago. No, I don't
17 remember.
18 Q. So if my client says that you came
19 back in and said you had been on the phone,
20 that's something you don't remember?
21 A. That would be the case.
22 Q. In your practice, was it ever your
23 practice to call people when you got into a
24 complication?
25 A. In certain complications, yes.

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1 Q. Ever call people in Utah at the
2 University of Utah?
3 A. During a procedure?
4 Q. If you remember. I know that's a
5 difficult question.
6 A. Gotcha. And I don't recall.
7 Q. Wouldn't be outside the realm of
8 possibility, though?
9 A. No.
10 Q. Do you know some of the doctors at the
11 Moran Eye Clinic?
12 A. I do.
13 Q. Do you refer people to them?
14 A. Occasionally.
15 Q. Is there anything else about this
16 procedure that you remember that you didn't put
17 in your note, in your operative note, which is on
18 page 4 of Exhibit 2?
19 A. Sitting here today, no.
20 Q. Okay. Just for a little more complete
21 record, vitreous is the fluid that's in the eye
22 itself?
23 A. Correct.
24 Q. And you did a vitrectomy?
25 A. Correct.

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1 Q. What does that entail? What did you
2 do when you did a vitrectomy?
3 A. You remove part of the vitreous.
4 Q. Does it say how much you removed?
5 A. It does not say that.
6 Q. Do you replace it with anything?
7 A. Yes.
8 Q. What do you replace it with?
9 A. Balanced salt solution.
10 Q. Does it say that in here?
11 A. I don't believe it does directly.
12 Q. Was referral to a retinal specialist
13 an option for this patient at that time?
14 A. There was no indication to.
15 Q. Have you looked at any of my client's
16 records for his -- the care of his eye after this
17 period of time through October of '06?
18 A. Yes.
19 Q. What's your understanding of how his
20 eye progressed after that time?
21 A. My understanding is that it has ups
22 and downs as different treatment options have
23 been used.
24 Q. If you had known that he was on
25 Flowmax, would it have been part of your informed

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14 (Pages 44 to 47)

<p>1 consent to tell him that he was at increased risk 2 because of the Flowmax? 3 A. Can you repeat the question again? 4 MR. PEDERSEN: Why don't you read it back. 5 (Record read by reporter.) 6 THE WITNESS: I would have discussed that 7 he does have some increased risk, yes. 8 Q. (BY MR. PEDERSEN) You've probably 9 done thousands of these surgeries? 10 A. Correct. 11 Q. I don't even know what number. Do you 12 know? 13 A. No. 14 Q. I wouldn't know what to guess. 15 A. No. 16 Q. But you did many hundreds, if not 17 thousands, of these, correct? 18 A. Yes. 19 Q. In your opinion, would it have been 20 reasonable for a person, if having been told that 21 he was going to have -- that he had Flowmax and 22 that there was new information regarding 23 increased risks that was just unfolding in the 24 medical literature, would it have been reasonable 25 to say that he might defer the surgery at that</p> <p style="text-align: right;">Page 48</p>	<p>1 different from the -- you're certified. Is there 2 an organization you belong to if you're certified 3 or are they two separate things? 4 A. They are two separate organizations. 5 Q. What organizations did you belong to 6 back then? 7 A. American Academy of Ophthalmology, 8 American Association of Pediatric Ophthalmology 9 and Business, Ada County Medical Society. 10 Probably some others that I don't recollect 11 offhand. 12 Q. The American Academy of Ophthalmology, 13 did it publish a journal? 14 A. Yes. 15 Q. Is that something that was part of 16 your routine for trying to keep current during 17 this period of time? 18 A. I did read the journal, yeah. 19 Q. Did it come out monthly or something? 20 A. Yes. 21 Q. Did you get your own copy or just one 22 come to the group? 23 A. I believe I got my own copy. 24 Q. Do you know what an FDA Dear 25 Doctor letter is?</p> <p style="text-align: right;">Page 50</p>
<p>1 time? 2 MR. JONES: Object to form. 3 THE WITNESS: Certainly a patient's 4 prerogative. 5 Q. (BY MR. PEDERSEN) I mean, I'm just 6 saying because you've dealt with a lot of people 7 who have had to undergo cataract surgery? 8 A. I have. 9 Q. You have a tremendous amount of 10 experience with dealing with people who have to 11 decide when to undergo cataract surgery. That's 12 why I asked that. 13 So based on that information, would 14 you agree with me that it would have been 15 reasonable for a patient to say, I think I'll 16 wait until we learn a little more about this? 17 MR. JONES: Object to form. 18 THE WITNESS: It would have been 19 reasonable. 20 Q. (BY MR. PEDERSEN) You're a member of 21 an association of ophthalmologists? 22 A. Correct. 23 Q. What was the name of that association? 24 A. There are a number of associations. 25 Q. Is the certifying organization</p> <p style="text-align: right;">Page 49</p>	<p>1 A. I've seen them, yeah. 2 Q. They might not call them Dear Doctor 3 anymore, they might call them Dear Health Care or 4 something. But did you get those from time to 5 time? 6 A. I recollect that I did. 7 Q. Did you read them when you got them? 8 A. Typically. 9 Q. Did you consider it an important part 10 of your practice to read those when they came 11 out? 12 A. It was something that we did. 13 Q. My client had a preop exam by his own 14 doctor. Do you remember that? 15 A. Correct. 16 Q. Dr. Paris. You don't probably 17 remember who it was? 18 A. I believe his physician was Dr. Paris, 19 yes. 20 Q. Prior to this surgery, did you get a 21 copy of any of his records or his note or 22 anything regarding his preop physical? 23 A. There is one in the chart. 24 Q. And where is that in the chart? Show 25 me in the actual chart.</p> <p style="text-align: right;">Page 51</p>

15 (Pages 48 to 51)

1 A. We've been at this for about an hour.
 2 Can I take a break?
 3 MR. PEDERSEN: You bet.
 4 (Break taken from 1:59 p.m. to 2:11 p.m.)
 5 Q. (BY MR. PEDERSEN) Now, just before
 6 the break, we were talking about how in the
 7 chart, there was a copy of Dr. Paris' note that
 8 he made on the preop examination.
 9 Do you remember that?
 10 A. Yes.
 11 Q. Did you review that note before the
 12 operation?
 13 A. I don't recall.
 14 Q. Do you think you did or not?
 15 A. Would you mind my making a more
 16 extended than yes or no?
 17 Q. Yes, you can answer the question the
 18 best you can.
 19 A. The aim of the clearance or the exam
 20 is for anesthesia and anesthesia risk.
 21 Quality -- our quality committee, in discussion
 22 with anesthesia, the anesthesiologists often like
 23 physical exams on patients by their personal
 24 physicians prior to undergoing general
 25 anesthesia.

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1 So the goal of the request for a
 2 physical exam is mostly for anesthesia. So,
 3 therefore, it is not uncommon for me not to
 4 review that. Typically, my assistant will note
 5 that the patient is cleared for anesthesia and
 6 let me know that. And that's the end of it.
 7 The attending physician, family
 8 physician, also, instead of sending a complete
 9 history and physical, will often just send a note
 10 that the patient is cleared for surgery. So it
 11 is not uncommon for me not to see that document.
 12 Q. Well, not to put words in your mouth,
 13 but you're saying you didn't really need to read
 14 it for your purposes?
 15 A. For my purposes, it was not.
 16 Q. He was cleared for anesthesia and that
 17 was the reason you had that done?
 18 A. Correct.
 19 MR. PEDERSEN: That's all I have.

EXAMINATION

BY MR. JONES:

23 Q. All right. I have a couple questions.
 24 Do you remember when plaintiff's counsel
 25 asked you about whether or not it was reasonable

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1 for a patient who undergo -- whether or not it
 2 was reasonable for this patient to decide not to
 3 undergo cataract surgery due to the fact that he
 4 had at some point taken Flowmax? Do you remember
 5 that line of questioning?
 6 A. I do.
 7 Q. Okay. What I want to know is this:
 8 Given the fact that you have performed thousands
 9 of these cataract surgeries and you've talked to
 10 thousands of patients and the fact that Flowmax
 11 has been on the market since 1997, have you
 12 performed cataract surgery on other patients that
 13 have a history of having taken Flowmax?
 14 A. Yes.
 15 Q. Have you ever had a patient who had
 16 taken Flowmax, either in the past or at the time
 17 of the surgery that you were undertaking to
 18 remove a cataract, decide not to undergo cataract
 19 surgery just because they had had a history of
 20 Flowmax?
 21 A. No.
 22 Q. So even after you've had your informed
 23 consent discussion with these patients, which
 24 included knowledge of the fact that Flowmax
 25 presents a slight increased risk of complication

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1 that you had shared with the patient, you had
 2 never had a patient decide to decline to undergo
 3 cataract surgery; is that correct?
 4 A. That is correct.
 5 Q. Doctor, did the standard of practice
 6 in place in May of 2006 require you to disclose
 7 that the medication Flowmax carried with it any
 8 increased risk at all of complications?
 9 A. No.
 10 Q. Why not?
 11 A. Flowmax was -- the association with
 12 any issues with cataract surgery was very unclear
 13 at the time. It was just beginning to be
 14 noticed. And there was no clear definition of
 15 what those complications were, what the risks
 16 were. The risk rate of complications from
 17 Flowmax in cataract surgery is very small, so --
 18 Q. When you say "small," how small are
 19 you talking?
 20 A. Well, the complication rate of
 21 cataract surgery is small. And the number of
 22 patients on Flowmax is small. And complications
 23 that are of any visual significance are very
 24 small. So very, very slight.
 25 Q. So --

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16 (Pages 52 to 55)

<p>1 A. If you double a very small number, 2 it's still a very small number. 3 Q. Are we talking something less than 4 1 percent here? 5 A. About 1 percent. 6 Q. You were also asked a question, 7 apparently, and I haven't had the opportunity to 8 talk to plaintiff's counsel's client in 9 deposition yet, but he apparently has some belief 10 that you were talking on the phone to someone or 11 may have been talking on the phone to someone 12 during this surgical procedure. 13 Do you remember being asked questions 14 about that? 15 A. Correct. 16 Q. Okay. Looking back at No. 1, is there 17 anything in your op note about you having made a 18 telephone call to anybody during this procedure? 19 A. No. 20 Q. If you had called a colleague, a 21 specialist of a different area of any kind of any 22 nature during this surgery, is that something 23 that you would have included in your op note? 24 A. Yes. 25 Q. Would there have been any reason for</p> <p style="text-align: right;">Page 56</p>	<p>1 patient about it. Are you changing your 2 testimony on that? You would have told him that 3 there was an increased risk? 4 A. I would have said that there is a 5 slight increased risk, yeah, typically. 6 Q. Regardless of what you said when your 7 counsel asked you a question, that's a fact, 8 isn't it? I mean, you've already said that's 9 true, isn't it? 10 MR. JONES: Object to form. 11 THE WITNESS: I typically would have said 12 that there is a slight increased risk, yes. 13 Q. (BY MR. PEDERSEN) Because you thought 14 he had a right to know that, didn't you? 15 A. Yeah. 16 Q. And you also said it wouldn't be 17 unreasonable for a guy to say, well, based on 18 that, I think I'll wait. I think I'll learn some 19 more about this; I don't think I'll do it? You 20 said that wouldn't be unreasonable, correct? 21 MR. JONES: Object to form. Misstates his 22 testimony. 23 Q. (BY MR. PEDERSEN) That's what you 24 said? 25 A. I think a patient is certainly capable</p> <p style="text-align: right;">Page 58</p>
<p>1 you to contact another medical specialist of any 2 kind given the complication that you encountered 3 during this surgery? 4 A. No. 5 Q. Are you telling us that based on what 6 you encountered and the complication that 7 occurred during this surgery that you were 8 competent and experienced enough to handle and 9 resolve it intraoperatively without someone else 10 getting involved? 11 A. Yes. 12 Q. As you sit here today, having looked 13 at your office note, having looked at your 14 surgical - your op note, do you have any reason 15 to believe that you would have contacted anyone 16 during the surgery on May 31, 2006? 17 A. I have no reason to believe that, no. 18 MR. JONES: Okay. That's all I have for 19 today, thank you. Do you have anything else? 20 MR. PEDERSEN: Well, yeah. 21 22 EXAMINATION 23 BY MR. PEDERSEN: 24 Q. Before, you told me that if you'd have 25 known about Flowmax, you would have told the</p> <p style="text-align: right;">Page 57</p>	<p>1 of making up their own mind, a competent adult. 2 Q. But all you were saying was it 3 wouldn't be unreasonable to go ahead with it, 4 either? Both of them would be reasonable things 5 to do? 6 A. Well, in my experience, it's not been 7 something that's been an issue for patients. But 8 patients have the right to make their own 9 decisions. 10 MR. PEDERSEN: That's all I have. 11 MR. JONES: Read and sign. 12 (The deposition concluded at 2:19 p.m.) 13 (Signature was requested.) 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 59</p>

17 (Pages 56 to 59)

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ORIGINAL
IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

B

I. INTRODUCTION

On November 13, 2009 Defendants filed their motion for summary judgment. The motion was based on the grounds that Plaintiffs could not, as a matter of law, establish a genuine issue of material fact regarding alleged deviations by the Defendants from the applicable standard of health care practice under Idaho Code §6-1012 or the alleged failure to obtain a valid informed consent consistent with Idaho Code §39-4506. In support of their motion, the Defendants filed the affidavit of Dr. Pressman. In opposition, the Plaintiffs have now filed the affidavit of their expert, Dr. John Hofbauer, a Beverly Hills, California physician.

This reply memorandum is submitted in support of Defendants' summary judgment motion set for hearing on January 12, 2010. As more fully outlined below, much of the discussion within Plaintiffs' opposition materials addresses irrelevant issues and/or case authorities which are distinguishable, fail to create an issue of fact and therefore have no bearing on the Court's resolution of the pending defense motion. This memorandum will demonstrate why the Plaintiffs have failed to establish an issue of fact as it relates to both the standard of practice and lack of informed consent counts of their Complaint under Idaho Code § § 6-1012 and 39-4506. As a result, the Defendants contend they are entitled to summary judgment as a matter of law as to both counts of the Plaintiffs' Complaint.

II. STANDARD OF REVIEW

Summary Judgment is appropriate where the record shows no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). The principle purpose of the Summary Judgment rule is to isolate and

dispose of factually unsupported claims, ***Sparks v. St. Luke's Regional Medical Center***, 115 Idaho 505, 768 P.2d 768 (1988). "The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." ***Thomas v. Medical Center Physicians, P.A.***, 138 Idaho 200, 205, 61 P.3d 557, 562 (2002).

With respect to affidavits submitted by plaintiffs' in medical malpractice cases, it is well settled regarding the relationship between Rule 56(e) and I.C. §§ 6-1012, and 6-1013 and the requirements placed on plaintiffs. The Idaho Supreme Court has noted, "the question of admissibility under Rule 56(e) is a threshold question to be analyzed **before applying the liberal construction and reasonable inference rules required in summary judgment.**" ***Rhodehouse v. Stuttz***, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994) (emphasis added). Rule 56(e) provides an additional requirement that "the affidavits must 'set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" ***Id.*** at 212, 868 P.2d at 1228.

III. ARGUMENT

A. *Because Plaintiffs' response materials, including the affidavit of Dr. Hofbauer, fail to address the issue of informed consent at all, Defendants are entitled to summary judgment as to the issue of informed consent*

Plaintiffs' response brief erroneously states, "The only element of Plaintiffs' case assailed in the motion is whether the Plaintiffs can prove that Dr. Pressman failed to meet the local standard of care in this case. No other issues have been raised by this

motion." **See** Plaintiffs' Memorandum in Opposition to Summary Judgment at p. 2. It is unclear how the Plaintiffs arrived at this conclusion based on the clear and unambiguous moving papers of the defense currently before the court. A review of the defense motion clearly shows that summary judgment is being sought on both the standard of practice AND lack of informed consent claims set forth in Plaintiffs' Complaint.

Indeed, the defense memorandum in support of summary judgment specifically states: "This motion is intended to address both the standard of practice and lack of informed consent claims contained within Plaintiffs' Complaint." **See** Defendants' Memorandum at p. 2. The defense memorandum goes on to address the elements and requirements of an informed consent claim in Idaho and why Dr. Pressman's affidavit meets the elements and shifts the burden of proof to the Plaintiffs' to respond. **See *Id.*** at p. 9-13. Nowhere in Plaintiffs' opposition memorandum do they discuss the elements of an informed consent claim, any informed consent case authorities, nor do they respond to the arguments raised in Defendants' memorandum regarding these issues. As a result, Plaintiffs have failed to establish a genuine issue of material fact as to the issue of informed consent and the Defendants should be granted summary judgment on this issue.

B. *Because the affidavit of Dr. Hofbauer fails to meet the requirements of Rule 56(e) and Idaho Code §6-1013, it is inadmissible and fails to create an issue of fact sufficient to avoid summary judgment in favor of the Defendants.*

Dr. Pressman's previously submitted affidavit, like the physician affidavit in ***Strode v. Lenzi***, 116 Idaho 214, 775 P.2d 106 (1989), shifted the burden to the Plaintiffs to provide contrary expert testimony in order to establish an issue of fact sufficient to avoid summary judgment. In opposition to Defendants' motion, Plaintiffs rely upon the Affidavit

of John Hofbauer, M.D. **See** Plaintiffs' Supplemental Expert Witness Disclosure containing the affidavit of Dr. Hofbauer. Because the affidavit of Dr. Hofbauer lacks foundation for his statement that he has actual knowledge of the local standard of practice, it fails to meet the requirements of Rule 56(e) and Idaho Code § 6-1013, is not admissible and therefore fails to overcome the pending defense motion.

A few key conclusions can be clearly drawn from the face of Dr. Hofbauer's affidavit. First, he is not an Idaho physician, he is in private practice in Beverly Hills, California. Second, it does not appear that he has ever practiced medicine in Idaho. Third, it is apparent he has never examined the patient, Franz Suhadolnik. Fourth, he has never discussed Mr. Suhadolnik's care with any physician from Idaho, nor has he discussed the local standards of practice applicable to Dr. Pressman with any physician from Boise for the time and place in question, namely 2006. Fifth, Dr. Hofbauer's affidavit contains the admission that the entire basis for his knowledge regarding the local standard of practice comes solely from his review of Dr. Pressman's deposition and the medical records in this case. **See** Dr. Hofbauer's affidavit.

Herein lies the crux of the problem for the Plaintiffs - there is a total lack of foundation for Dr. Hofbauer's opinions. The defense contends that Dr. Hofbauer's limited actions in simply reviewing Dr. Pressman's deposition and the medical records are insufficient as a matter of law to provide him with requisite "actual knowledge" of the local community standard of practice. Idaho Rule of Civil Procedure 56(e) provides:

Form of Affidavits - Further Testimony - Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the

affiant is competent to testify to the matters stated therein.

I.R.C.P. 56(e) (emphasis added). **See also *Dulaney v. St. Alphonsus Reg'l Med. Ctr.***, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002); ***Rhodehouse v. Stutts***, 125 Idaho 208, 212, 868 P.2d 1224, 1228 (1994). In addition to the requirements of Rule 56(e), Idaho Code § 6-1013 provides in pertinent part:

The applicable standard of practice and such a defendant's failure to meet such standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefore is first laid. . . .

Idaho Code § 6-1013 (emphasis added).

To be admissible under Rule 56(e) and Idaho Code §6-1013, Plaintiffs are required to state within the body of Dr. Hofbauer's affidavit precisely how he became familiar with the standard of practice applicable to Dr. Pressman. **See *Perry v. Magic Valley Reg'l Med. Ctr.***, 134 Idaho 46, 995 P.2d 816 (2000); ***Hayward v. Jack's Pharm., Inc.***, 141 Idaho 622, 626 (2005). When compared against the record before the court, there is no foundation for Dr. Hofbauer's opinion that he has "actual knowledge" of the standard of practice applicable to Dr. Pressman. Plaintiffs' creatively try to sidestep this fatal flaw in Dr. Hofbauer's affidavit by maintaining in summary fashion that he learned all he needed about the local standard of practice by reviewing Dr. Pressman's 59-page deposition transcript. Dr. Hofbauer's affidavit contains the following conclusory statement:

I have actual knowledge of the standard of care as it existed in Boise, Idaho, during May of 2006 as it related to the provision of medical care to Franz Suhadolnik by Dr. Pressman. My

knowledge comes from my experience and training, as well as from the testimony provided by Dr. Pressman in his deposition and of the medical records of Franz Suhadolnik.

See Affidavit of John Hofbauer, M.D. served December 24, 2009, ¶ 5.

While the defense concedes that the Supreme Court has indicated there is more than one way for an out of area expert to familiarize himself with the local standard of practice, the defense nonetheless maintains that what Dr. Hofbauer has done in this case is insufficient as a matter of law to provide him with the required actual knowledge of the local standard of practice. Indeed, over the course of many decisions Idaho's appellate courts have specifically identified certain steps which an out of area expert must take in order to lay an adequate foundation for his or her opinion in opposing a defense motion for summary judgment. Because Dr. Hofbauer failed to take these required steps, his affidavit should be deemed inadmissible.

The option of reviewing a deposition is one way to impart knowledge of the local standard of practice. However, the feasibility of this option obviously depends on what statements are contained within that deposition. The Idaho Supreme Court summarized this issue in **Grover v. Smith**, 137 Idaho 247, 251 (2002): "An out-of-state expert can become familiar with the local standard of care by inquiring of a local specialist or by "review of a deposition stating that the local standard does not vary from the national standard, coupled with the expert's personal knowledge of the national standard." (Quoting **Perry v. Magic Valley Reg'l Med. Ctr.**, 134 Idaho 46, 51-52, 995 P.2d 816, 821-22 (2000)) (emphasis added).

The defense contends that the contents of Dr. Pressman's deposition did not impart to Dr. Hofbauer the information required to lay the foundation for his opinion that he has actual knowledge of the local standard of practice. Notably absent from Dr. Pressman's deposition is any mention of any national standard of practice deemed critical by the courts in both **Grover** and **Perry**. Nowhere in his deposition does Dr. Pressman state that the local Boise standard of practice for an ophthalmologist in 2006 was the same as any alleged national standard of practice - nor did he even say there was a national standard applicable to him.

Indeed, Dr. Hofbauer appears to be relying upon what can only be described as a few generic and nonspecific questions posed in Dr. Pressman's deposition. Dr. Pressman agreed that the standard of practice requires him to know how to perform cataract surgery, it requires him to keep current on medical literature in the field and it requires him to take an adequate patient history. **See** deposition of Dr. Pressman at pp. 6-9, attached to the affidavit of Plaintiffs' counsel in opposition to the summary judgment. From such basic statements, Plaintiffs conclude both in Dr. Hofbauer's affidavit and in their opposition papers that "Dr. Pressman's testimony clearly indicates the local standard of care as it relates to cataract surgery such as at issue in this case." **See** Plaintiffs' Memorandum in Opposition at p. 12. The defense strongly disputes Plaintiffs' conclusory statements.

There is nothing in Dr. Pressman's deposition that discusses what the local standard of practice required of him in 2006 in order to know how to properly perform cataract surgery. Similarly, there is nothing in Dr. Pressman's deposition which discusses what he was required to do as an ophthalmologist in Boise in 2006 in order to keep current

on medical literature in his field. There is also nothing in the deposition which discusses what is required of ophthalmologists practicing in Boise in 2006 in order to obtain an adequate patient history, nor is there anything in Dr. Pressman's deposition which says what the standard of practice required him to do or that he failed to comply with the local standard of practice applicable to him. As a result, the defense contends there is a complete lack of foundation for Dr. Hofbauer's opinion that he has actual knowledge of the local standard of practice applicable to Dr. Pressman.

For example, Dr. Hofbauer states in his affidavit that in 2006 it was commonly known in Boise, Idaho that prior Flomax use, and/or the condition of this particular patient's epiretinal membrane, increased his potential risk of complications from cataract surgery. **See** Affidavit of Dr. Hofbauer at ¶ 8 (a)-(c). However, there is nothing in Dr. Pressman's deposition or in any of the medical records to support such a contention. Plaintiffs have similarly failed to provide any foundation that prior Flomax use and/or the condition of the patient's epiretinal membrane amounted to a "material risk" such that it was required to be disclosed preoperatively to the patient in order to comply with the requirements under Idaho Code § 39-4506. Indeed, Dr. Pressman testified to the opposite in his deposition when he stated that the standard of practice did NOT require him to disclose to the patient that the drug Flomax carried with it any increased potential risk of complications during cataract surgery. **See** Deposition of Dr. Pressman at p. 55, ¶ 5-9. Further examples in Dr. Pressman's deposition are as follows:

Q: Was the standard of practice to advise the patient of all known risks or all important risks?

A: No.

Q: There was some important risks that you didn't tell them about?

Defense counsel: Object to form

A: The standard of practice is to inform the patient of the inherent risks of a procedure, alternatives, benefits. From my point of view, it's important to discuss goals and timing and let him make his own decision. Those risks are the major complications or significant risks that are present.

Depo of Dr. Pressman at p. 9, ll. 12-25.

Q: If you'd have known he was on Flomax, would you have treated him any differently?

A: No.

Q: It wouldn't have made any different at all?

A: He would have had the same surgical procedure, yes.

Depo of Dr. Pressman at p. 32, ll. 5-11.

Q: Did the standard of practice in place in May 2006 require you to disclose that the medication Flomax carried with it any increased risk at all of complications?

A: No.

Depo of Dr. Pressman at p. 55, ll. 5-9.

The defense contends that the present case is distinguishable from the case of **Kozlowski v. Rush**, 121 Idaho 825, 828 P.2d 854 (1992) relied upon by the Plaintiffs. **Kozlowski** involved the admissibility of expert testimony at trial. In **Kozlowski**, the plaintiff's out-of-state expert reviewed a deposition in which a local specialist testified that the local standard was NO different than the national standard. 121 Idaho at 829, 828 P.2d at 858. Under those circumstances, the Court found that the plaintiff's expert was

sufficiently familiar with the local standard of care and that the trial court erred by not allowing his testimony at trial. *Id.* at 830, 828 P.2d at 859.

Instead, this case is more analogous to the facts presented in ***Rhodehouse v. Stutts***, 125 Idaho 208, 212 (1994). In ***Rhodehouse***, the plaintiff in a medical malpractice case argued that his out of area expert, Dr. Jenkins, became sufficiently familiar with the local standard of practice through his review of the deposition of the defendant physician, Dr. Stutts, and his review of the radiology films and hospital records. Unlike the physician in ***Kozlowski***, Dr. Stutts NEVER stated that the local standard of care was the same as any so-called national standard, nor was there any allegation that Dr. Stutts made any direct reference to the local standard of practice which would impart the knowledge necessary to lay the foundation for the plaintiff's expert's opinions. In addition, the Supreme Court previously held that an expert cannot become familiar with the local standard of practice merely by reviewing hospital records and the actions of a local physician. ***See Gubler v. Boe***, 120 Idaho 294, 297-98, 815 P.2d 1034, 1037-38 (1991).

Consistent with the court's holding in ***Rhodehouse***, Dr. Pressman's deposition similarly does not state that the local standard of practice is or was the same as any national standard. Because Dr. Hofbauer has otherwise failed to communicate with any physician with actual knowledge of the local standard of practice applicable to Dr. Pressman in 2006, there is no foundation for his opinion that he had actual knowledge of said community standard. Instead, all we are left with is the conclusory statement by Dr. Hofbauer. The ineffectiveness of such conclusory statements were previously discussed by the Idaho Supreme Court in ***Strode v. Lenzi***, 116 Idaho 214, 775 P.2d 106 (1989):

Thus, an expert from outside the state must demonstrate that he possesses knowledge of the local community standard. If he is board certified in the same specialty, he must, at a minimum, inquire of a local specialist to determine whether the local community standard varies from the national standard for that board certified specialty. **Totally insufficient are statements such as Dr. Hall's naked assertion that because he is familiar with the national standard of care he is also "familiar with what is expected of a board certified orthopedic surgeon in Boise." Dr. Hall's affidavits show no effort to obtain information regarding the local standard of care and, as the trial court noted, are "conclusory statements which are incapable of objective evaluation by anyone"** Consequently, there was no showing of a genuine issue of fact which must be tried. The trial court did not err in entering summary judgment for Dr. Lenzi.

Strode, 116 Idaho at 216 (1989) (citations omitted) (emphasis added). **See also, McDaniel v. Inland Northwest Renal Care Group-Idaho, L.L.C.**, 144 Idaho 219, 223 (2007) (stating that at a minimum, an out-of-state expert making such a claim is required to "inquire of a local specialist to determine whether the local community standard varies from the national standard."); **Dulaney v. St. Alphonsus Regional Medical Center**, 137 Idaho 160, 45 P.3d 816 (2002) (the out-of-state expert's opinion lacked foundation where he had talked with a Boise physician practicing internal medicine but there was no showing that the Boise physician would know the standard of care for emergency room physicians in Boise). Under the facts of this case, the conclusory statement by Dr. Hofbauer is insufficient to render his affidavit admissible. As a result, the Plaintiffs have failed to create an issue of fact regarding their claim that Dr. Pressman violated the standard of practice.

IV.
CONCLUSION

The record establishes that the affidavit of Dr. Hofbauer contains merely the "naked assertion" and "conclusory statement" that he has actual knowledge of the local standard of practice applicable to Dr. Pressman. When the basis for his opinion is explored as set forth above, it is clear that no foundation for his opinion exists. As a result, his affidavit is inadmissible and Plaintiffs' have failed to establish an issue of fact sufficient to preclude the entry of summary judgment in favor of the Defendants. Based on the foregoing, Defendants respectfully request the Court grant their Motion for Summary Judgment as to all counts of the Plaintiffs' Complaint.

DATED this 5th day of January, 2010.

CAREY PERKINS LLP

By 

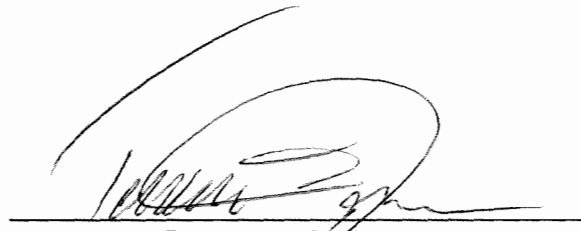
Terrence S. Jones, Of the Firm
Attorneys for Defendants
Scott H. Pressman, M.D. and
The Eye Associates, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2010, I served a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Terrence S. Jones

FEB 18 2010

J. DAVID NAVARRO, Clerk
By *[Signature]* DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
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Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV-PI-08-08249

MEMORANDUM DECISION
AND ORDER

This matter is before the Court upon Defendants Scott H. Pressman, M.D. ("Dr. Pressman"), Scott H. Pressman, M.D., L.L.C., and The Eye Associates, P.A.'s motion for summary judgment. The Court heard oral argument on January 12, 2010. Jarom A. Whitehead and Kenneth L. Pedersen, Pedersen & Whitehead, appeared for the Plaintiffs, Franz Suhadolnik ("Franz") and Betty Suhadolnik (collectively "the Suhadolniks), with argument by Mr. Whitehead. Terrence S. Jones, Carey Perkins LLP, appeared and argued for the Defendants. For the reasons set forth herein, the Court will grant the Defendants' motion for summary judgment.

Background and Proceedings

In October of 2005, Franz met with Dr. Pressman for a cataract surgery consultation. Dr. Pressman is an ophthalmologist who is licensed to practice medicine and surgery in Idaho. At

the time of the consultation, Franz was not taking a medication called Flomax.¹ However, Franz began taking the medication in December 2005. Franz stopped taking Flomax after about a month due to side effects from the medication.

On May 25, 2006, Franz met with his own physician—Dr. Paris—for a preoperative exam. Dr. Paris is the physician who had originally prescribed Flomax to Franz. On May 30, 2006, Franz went to the Eagle Surgery and Laser Center for another preoperative exam. When asked about what medications he was currently taking, Franz did not mention that he had previously taken Flomax. Franz was not currently taking Flomax, and he was not asked if he had taken Flomax in the past. On May 31, 2006, Dr. Pressman performed cataract surgery on Franz.

Franz alleges that Flomax exacerbates the risks involved in cataract surgery and that as a result of the past use of Flomax, he sustained an injury to his eye during the cataract surgery. On May 2, 2008, the Suhadolniks filed this medical malpractice action against the Defendants. The Suhadolniks allege that Dr. Pressman was negligent in performing the surgery and that Dr. Pressman violated Idaho's informed consent law by not informing Franz about potential increased risks arising from Franz's past use of Flomax.

Standard of Review

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership*,

¹ The Court understands that Flomax is used to treat male urinary symptoms due to an enlarged prostate. See <http://www.flomax.com/>.

1 145 Idaho 735, 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102,
2 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to
3 demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance*
4 *Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902,
5 905, 935 P.2d 165, 168 (1997)). In construing the facts, the court must draw all reasonable
6 factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.*, 145
7 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different
8 conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67,
9 593 P.2d 402 (1979).

10
11 Where the party moving for summary judgment will not carry the burden of production
12 or proof at trial, the “genuine issue of material fact” burden may be met by establishing the
13 absence of evidence on an element that the nonmoving party will be required to prove at trial.
14 *Hines v. Hines*, 129 Idaho 847, 852, 934 P.2d 20, 25 (1997). Such an absence of evidence may
15 be established either by an affirmative showing with the moving party's own evidence or by a
16 review of all the nonmoving party's evidence and the contention that such proof of an element is
17 lacking. *Peterson v. Shore*, 146 Idaho 476, 478, 197 P.3d 789, 791 (Ct. App. 2008). “Once
18 such an absence of evidence has been established, the burden then shifts to the party opposing
19 the motion to establish, through further depositions, discovery responses or affidavits, that there
20 is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under
21 I.R.C.P. 56(f). *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)
22 (citing *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct. App. 1994).
23
24
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1 Evidence offered in support of, or in opposition to, summary judgment: "shall be made
2 on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall
3 show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P.
4 56(e). Moreover, the party offering the evidence also must demonstrate that the witness is
5 competent to testify about the matters discussed in the testimony. *Id.* "Statements that are
6 conclusory or speculative do not satisfy either the requirement of admissibility or competency
7 under Rule 56(e)." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912,
8 917, 188 P.3d 854, 859 (2008) (citing *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160,
9 164, 45 P.3d 816, 820 (2002)).

11 Discussion

12 In support of his motion for summary judgment, Dr. Pressman has submitted an
13 affidavit. Dr. Pressman is a duly licensed physician in Boise, Idaho who was continuously
14 engaged in the medical specialty of ophthalmology and cataract surgery from October 1984
15 until he retired in July 2006. Dr. Pressman is familiar with the 2006 local standard of practice
16 regarding inquiry into whether a prospective cataract surgery patient was taking, or had been
17 taking, Flomax. According to Dr. Pressman, the applicable standard of practice did not require
18 any preoperative inquiry into whether the patient had ever taken Flomax, and did not require a
19 physician to disclose to a prospective cataract surgery patient that there was any increased risk
20 associated with past use of Flomax. Dr. Pressman further testified that he complied in all
21 respects with the applicable local standard of care in treating Franz. Dr. Pressman also testified
22 that he obtained appropriate informed consent prior to performing cataract surgery on Franz and
23 that such informed consent was consistent with the requirements of Idaho law.
24
25
26

1 The Court has reviewed Dr. Pressman's affidavit and concludes it contains an adequate
2 foundation for the opinions stated. Accordingly, the statements and opinions are admissible
3 and the affidavit is sufficient to show that: 1) Dr. Pressman complied with the applicable local
4 standard of care; and 2) Dr. Pressman complied with the requirements of the informed consent
5 law. Applying accepted principles of summary judgment review, the burden shifts to Franz to
6 demonstrate that there is a genuine issue of material fact concerning: 1) the applicable standard
7 of care; and 2) compliance with the requirements of the informed consent law.

8 In response, Franz offered the affidavit of John D. Hofbauer, M.D. (Dr. Hofbauer). Dr.
9 Hofbauer is a board certified ophthalmologist whose medical practice is located in Beverly
10 Hills, California. In his affidavit, Dr. Hofbauer asserts that Dr. Pressman breached the
11 applicable local standard of care in a number of respects, and that these breaches were related to
12 the poor surgical outcome and loss of vision in the eye.

14 In a malpractice action, the plaintiff must offer evidence from an expert witness who
15 can testify as to the local or a community standard of care. Idaho Code §§ 6-1012, 1013.² The
16

17
18 ² "The applicable standard of practice and such a defendant's failure to meet said standard must be established in
19 such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and
20 such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that
21 such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable
22 medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with
23 actual knowledge of the applicable said community standard to which his or her expert opinion testimony is
24 addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert
25 witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a
26 particular) such area and thereafter giving opinion testimony in such a trial." Idaho Code § 6-1013

22 "In any case, claim or action for damages due to injury to or death of any person, brought against any physician
23 and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse
24 practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist,
25 hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of
26 the provision of or failure to provide health care or on account of any matter incidental or related thereto, such
claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert
testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently

community standard takes into account factors such as the class, community, training, qualifications, and experience of a particular physician. *Id.* "An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time." *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002) (citing *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000); *Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994)). A board certified expert can testify as to the general standard of practice in the particular specialty. *Buck v. St. Clair*, 108 Idaho 743, 746, 702 P.2d 781, 784 (1985). However, an out-of-state board certified expert must still demonstrate knowledge of the local standard of care to insure there are no local deviations from the national standard of care. *Grimes v. Green*, 113 Idaho 519, 521, 746 P.2d 978, 980 (1987).

One way an out-of-state physician can learn the local standard of care is by questioning a local physician practicing in the same specialty. *Buck*, 108 Idaho at 746, 702 P.2d at 784.

Another way for an out-of-state medical expert to learn the local standard of care is from reviewing deposition testimony from a local medical expert which states that the local standard

failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided." Idaho Code § 6-1012.

1 of care does not vary from the national standard of care. *Grover v. Smith*, 137 Idaho 247, 251,
2 46 P.3d 1105, 1109 (2002) (citing *Perry v. Magic Valley Regional Medical Center*, 134 Idaho
3 46, 51, 995 P.2d 816, 821 (2000)).

4 Here, the Suhadolniks' medical expert is an out-of-state board certified expert. Thus, it
5 is presumed that Dr. Hofbauer is familiar with the general standard of care applicable to the
6 medical specialties of ophthalmology and cataract surgery. Even so, the Suhadolniks must
7 show that the out-of-state expert became familiar with the local standard of care in these areas.

8 In his affidavit, Dr. Hofbauer states:

9
10 I have actual knowledge of the standard of care as it existed in Boise, Idaho,
11 during May of 2006 as it related to the provision of medical care to Franz
12 Suhadolnik by Dr. Pressman. My knowledge comes from my experience and
training, as well as from the testimony provided by Dr. Pressman in his
deposition and of the medical records of Franz Suhadolnik.

13 (Affidavit of John D. Hofbauer, M.D. at ¶ 5 attached to December 24, 2009 Plaintiffs'

14 Supplemental Disclosure of Expert Witnesses.)

15 However, there is no indication that Dr. Hofbauer has ever practiced medicine in Boise,
16 Idaho. Accordingly, his experience and training are not sufficient to demonstrate knowledge of
17 the local standard of care. Moreover, an out-of-state expert cannot become familiar with the
18 local standard of care merely by reviewing medical records. *Rhodehouse v. Stutts*, 125 Idaho
19 208, 212, 868 P.2d 1224, 1228 (1994) (citing *Gubler v. Boe*, 120 Idaho 294, 297-98, 815 P.2d
20 1034, 1037-38 (1991)).

21
22 Thus, Dr. Hofbauer's knowledge of the applicable local standard can only have come
23 from his review of the deposition of Dr. Pressman. A copy of the deposition of Dr. Pressman is
24 attached as an exhibit to the affidavit of Plaintiffs' counsel, Mr. Whitehead. (December 29,
25

26 000188

2009 Affidavit of Counsel in Support of Memorandum in Opposition to Defendants' Motion
for Summary Judgment, Exhibit "D.")

The Court has reviewed the deposition of Dr. Pressman, but is unable to find that the deposition contains sufficient admissible evidence regarding the local standard of care concerning precautions due to past use of the medication Flomax. The deposition of Dr. Pressman contains the following exchanges:

Q. (By Plaintiffs' counsel Mr. Pedersen) Was it the standard of care then to know how to do a cataract surgery if you were going to do one?

....

A. Certainly, there's a standard of practice. But again, I'm not quite sure what you mean by standard of care. Standard of practice, yes.

Q. You make a distinction between standard of care and standard of practice?

A. I do.

Q. What's the difference?

A. Well, the standard of practice is what is done locally in this community based on its resources, procedures that we have done in the community, the people in the community, the peer review. A number of things.

....

A. Standard of practice is set in the local community, so it's what we practice.

Q. Was it the standard of practice back in May of '03 in this community to take an adequate history before you did a cataract history [sic]?

A. In May of '03, yes.

Q. In May of '06.

A. Oh, in May of '06. Yes.

....

1 Q. At that time, was it the standard of care to advise the patient of all the risks
2 of a cataract surgery?

3

4 A. Standard of practice is not to advise the patient of all possible risks.

5 Q. Was it the standard of practice to advise the patient of all known risks or all
6 important risks?

7 A. No.

8 Q. There was some important risks that you didn't tell them about?

9

10 A. The standard of practice is to inform the patient of the inherent risks of a
11 procedure, alternatives, benefits. From my point of view, it's important to
12 discuss goals and timing and let him make his own decision. Those risks are the
13 major complications or significant risks that are present.

14

15 Q. Before you retired – when did you retire?

16 A. I believe in 2006.

17 Q. Before you retired and you were doing cataract surgeries, and you were
18 aware that a patient was on –had taken Flowmax [sic], what did you tell a patient
19 about Flowmax [sic], if anything?

20 A. Well the data was not very conclusive in 2006. And I would have said
21 something general, such as, there is a slightly increased risk of complication in
22 people who are on Flowmax [sic].

23 Q. You would have said "slightly"?

24

25 Q. Was it the standard of care to say "slightly"?

26

1 A. I'm not aware of what the standard practice in the community was for that
2 particular drug at that particular time. Because as I said, the data on Flowmax
[sic] was fairly recent and was not conclusive at that time.

3 Q. . . . [W]ell, did you know that the patient was on Flowmax [sic] at the time
4 you started on my client, when you started the surgery on May 30th, '06?

5 A. No

6

7 Q. If you had known that he was on Flowmax [sic], would it have been part of
8 your informed consent to tell him that he was at increased risk because of the
Flowmax [sic]?

9

10 A. I would have discussed that he does have some increased risk, yes.

11

12 Q. In your opinion, would it have been reasonable for a person, if having been
13 told that he was going to have – that he had Flowmax [sic] and that there was
14 new information regarding increased risks that was just unfolding in the medical
15 literature, would it have been reasonable to say the he might defer the surgery at
that time?

16

17 A. It would have been reasonable.

18

19 Q. (By Dr. Pressman's counsel, Mr. Jones) Doctor, did the standard of practice
20 in place in May of 2006 require you to disclose that the medication Flowmax
[sic] carried with it any increased risk at all of complications?

21 A. No.

22 Q. Why not?
23
24
25
26

1 A. Flowmax [sic] was – the association with any issues with cataract surgery
2 was very unclear at the time. It was just beginning to be noticed. And there was
3 no clear definition of what those complications were, what the risks were. The
4 risk rate of complications from Flowmax [sic] in cataract surgery is very small,
5 so –

6 Q. When you say “small,” how small are you talking?

7 A. Well, the complication rate of cataract surgery is small. And the number of
8 patients on Flowmax [sic] is small. And complications that are of any visual
9 significance are very small. So very, very slight.

10 (Dep. of Dr. Pressman, pp. 6-9, 14-15, 47-49, 55.)

11 Dr. Pressman stated specifically: “I’m not aware of what the standard practice in
12 the community was for that particular drug at that particular time. Because as I said, the
13 data on Flowmax [sic] was fairly recent and was not conclusive at that time.”

14 (Deposition at pp. 14-15.) Also, when asked whether the standard of practice in place in
15 May of 2006 required disclosure that Flomax had any increased risk of complications,
16 Dr. Pressman responded “No.” (Deposition at p. 55.) Further, Dr. Pressman did not
17 testify that the local standard of care was the same as the national standard of care.

18 It is worth noting that Dr. Hofbauer’s affidavit completely ignores the more
19 recent affidavit of Dr. Pressman in which he stated he was familiar with the local
20 standard of care applicable in 2006 and that the local standard of care did not require a
21 physician to disclose to a patient that there were increased risks in cataract surgery if the
22 patient had ever taken Flomax. (November 13, 2009 Affidavit of Scott H. Pressman,
23 M.D. at ¶¶ 1, 5.)

24 Dr. Hofbauer’s affidavit does not demonstrate actual knowledge of the local standard of
25 care applicable to ophthalmology and cataract surgery. Accordingly, his testimony does not
26

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1 meet the requirements of Idaho Code §§ 6-1012, 1013 and is inadmissible under I.R.C.P. 56(e).

2 The Suhadolniks have not offered any other expert testimony, and because expert testimony of
3 the local standard of care is required in a medical malpractice case, the Court will grant
4 summary judgment in favor of the Defendants on the medical malpractice claim.

5 The Defendants have also requested summary judgment that Dr. Pressman did not
6 violate Idaho's informed consent law. The issue of informed consent is governed by Idaho Code
7 § 39-4506.³ The language of Idaho Code § 39-4506 "establishes an objective medical-
8 community standard." *Sherwood v. Carter*, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991).
9 Idaho Code § 39-4506 provides:
10

11 Consent, or refusal to consent, for the furnishing of hospital, medical, dental or
12 surgical care, treatment or procedures shall be valid in all respects if the person
13 giving or refusing the consent is sufficiently aware of pertinent facts respecting
14 the need for, the nature of, and the significant risks ordinarily attendant upon,
15 such a patient receiving such care, as to permit the giving or withholding of such
16 consent to be a reasonably informed decision. Any such consent shall be deemed
17 valid and so informed if the physician or dentist to whom it is given or by whom
18 it is secured has made such disclosures and given such advice respecting

16
17 ³ The substance of Idaho Code § 39-4506 was previously codified at § 39-4304. However, in 2005, the legislature
18 consolidated the consent laws, which were previously codified in chapters 43 and 45 of title 39, into chapter 45 of
19 title 39 only. The current Idaho Code § 39-4506 was added by 2005 Idaho Session Law, chapter 120, § 2, as
20 amended by 2007 Idaho Session Law, chapter 196, § 6. Thus, much of the case law on the issue of informed
21 consent refers to the previous codification, which is substantially similar to the current codification. The former
22 codification provides:

20 SUFFICIENCY OF CONSENT. Consent for the furnishing of hospital, medical, dental or surgical care,
21 treatment or procedures shall be valid in all respects if the person giving it is sufficiently aware of
22 pertinent facts respecting the need for, the nature of and the significant risks ordinarily attendant upon
23 such a patient receiving such care, as to permit the giving or withholding of such consent to be a
24 reasonably informed decision. Any such consent shall be deemed valid and so informed if the physician
25 or dentist to whom it is given or by whom it is secured has made such disclosures and given such advice
26 respecting pertinent facts and considerations as would ordinarily be made and given under the same or
similar circumstances, by a like physician or dentist of good standing practicing in the same community.
As used in this section, the term "in the same community" refers to that geographical area ordinarily
served by the licensed general hospital at or nearest to which such consent is given. *See Anderson v.*
Hollingsworth, 136 Idaho 800, 804, 41 P.3d 228, 232 (2001).

1 pertinent facts and considerations as would ordinarily be made and given under
2 the same or similar circumstances, by a like physician or dentist of good
3 standing practicing in the same community. As used in this section, the term "in
4 the same community" refers to that geographic area ordinarily served by the
5 licensed general hospital at or nearest to which such consent is given.

6 Idaho Code § 39-4506.

7 "To establish a claim based on the doctrine of informed consent, a patient must prove
8 three basic elements: nondisclosure, causation and injury." *Id.* at 257, 805 P.2d at 463 (citing
9 *Smith v. Karen S. Reisig, M.D., Inc.*, 686 P.2d 285 (Okla.1984); *Buzzell v. Libi*, 340 N.W.2d 36
10 (N.D.1983)). To prove nondisclosure, a plaintiff must prove that the physician "failed to meet
11 the objective, medical community-based standard of disclosure for informed consent"
12 *Anderson v. Hollingsworth*, 136 Idaho 800, 805, 41 P.3d 228, 233 (2001). The statute uses the
13 term "in the same community" and defines that term as "that geographic area ordinarily served
14 by the licensed general hospital at or nearest to which such consent is given." Idaho Code § 39-
15 4506. Thus, under the statute, in order to state a prima facie case for violation of the informed
16 consent statute, a plaintiff must show that the physician did not make a disclosure which would
17 ordinarily be made under the same or similar circumstances by a like physician of good
18 standing practicing in the same geographical area as the accused physician.

19 Because Idaho Code § 39-4506 requires a plaintiff to prove a violation under a
20 community based standard, the Suhadolniks must present evidence of a violation of this
21 standard in order to create a genuine issue of material fact and survive summary judgment.
22 Here, the Suhadolniks have not presented evidence of a violation of the community based
23 standard. For the reasons discussed above, the testimony of the Suhadolniks' expert, Dr.
24 Hofbauer, does not show that he had actual knowledge of the local standard. He could not have
25 known the local standard because Dr. Pressman did not state that the local standard was the
26 same as the national standard nor did Dr. Pressman state what the local standard was
concerning informing patients of the risks involved with cataract surgery after using Flomax in

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1 the past. In fact, in his deposition, Dr. Pressman stated that he was, "not aware of what the
2 standard practice in the community was for [Flomax] at that particular time. Because, as I said,
3 the data on Flowmax [sic] was fairly recent and was not conclusive at that time." (Dep. of Dr.
4 Pressman, pp. 14-15.)

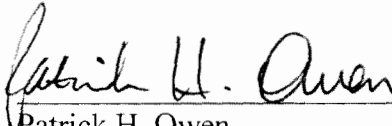
5 Because the Suhadolniks have not shown that their expert knew the local standard when
6 he gave his opinion, they cannot show that the local standard regarding informed consent has
7 been violated. Accordingly, the Court will grant the Defendants' motion for summary judgment
8 as to the informed consent count.

9 Conclusion

10 For the foregoing reasons, the Court will grant the Defendants' motion for summary
11 judgment on both counts contained in the Suhadolniks' complaint.

12 IT IS SO ORDERED.

13 Dated this 18 day of February 2010.

14 
15 Patrick H. Owen
16 District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, a true and correct copy of the within instrument as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

TERRENCE S. JONES
CAREY PERKINS LLP
SIXTEENTH FLOOR US BANK PLAZA
101 S CAPITOL BLVD STE 1600
PO BOX 519
BOISE ID 83701-0519

JAROM A. WHITEHEAD
PEDERSEN AND WHITEHEAD
161 5TH AVE SOUTH STE 301
PO BOX 2349
TWIN FALLS ID 83303-2349

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: Feb. 18, 2010

By *Martha Lyke*
Deputy Clerk

RECEIVED
FEB 22

Ada County Clerk

Terrence S. Jones, ISB No. 5811
CAREY PERKINS LLP
Sixteenth Floor, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 519
Boise, Idaho 83701
Telephone (208) 345-8600
Facsimile (208) 345-8660

Attorneys for Defendants
Scott H. Pressman, M.D. and
The Eye Associates, P.A.

MAR 16 2010

400
D.H.

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants.

Case No. CV PI 0808249

JUDGMENT

The Court having entered an Order granting the Defendants' Motion for
Summary Judgment which is dispositive of all issues of the case,

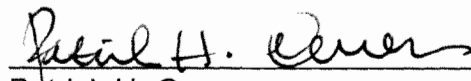
JUDGMENT - 1

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint and causes of action of the Plaintiffs is hereby dismissed on the merits with prejudice.

DATED this 17 day of ^{March}~~February~~, 2010.

DISTRICT JUDGE


Patrick H. Owen

CLERK'S CERTIFICATE OF SERVICE

MAR 18 2010

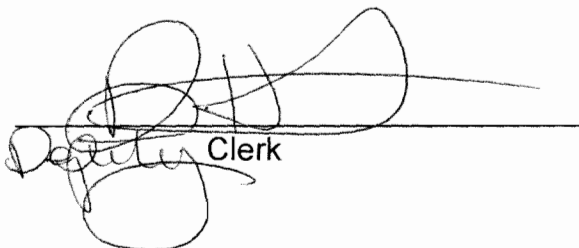
I HEREBY CERTIFY that on this ____ day of ~~February~~, 2010, I served a true and correct copy of the foregoing JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

Jarom A. Whitehead
PEDERSEN & WHITEHEAD
161 5th Avenue South, Suite 301
P. O. Box 2349
Twin Falls, Idaho 83303-2349
Telephone (208) 734-2552
Attorneys for Plaintiffs
Franz Suhadolnik and Betty Suhadolnik

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☐ Hand-Delivered
☐ Overnight Mail
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Attorneys for Defendants Scott H. Pressman, M.D.
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☐ Overnight Mail
☐ Facsimile (208) 345-8660


Clerk

PEDERSEN and WHITEHEAD
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208/734-2552

Attorney for:

Plaintiffs/Appellants

RECEIVED

MAR 22 2010

Ada County Clerk

NO. _____ FILED
A.M. 8:00 P.M. _____

MAR 22 2010

J. DAVID NAVARRO, Clerk
By BRADLEY J. THIES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as
husband and wife,

Plaintiffs/Appellants,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A.,
an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE
and JANE DOE, husband and wife, I
through X,

Defendants/Respondents.

Case No. CV PI 0808249

NOTICE OF APPEAL

Fee: \$101.00

Category: T

TO: SCOTT H. PRESSMAN, M.D., SCOTT H. PRESSMAN, M.D., a Limited Liability
Company, THE EYE ASSOCIATES, P.A., an Idaho Corporation, and BUSINESS
ENTITIES I through X, and JOHN DOE and JANE DOE, husband and wife, I through X,
their counsel of record, and the Clerk of the above-entitled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiffs/Appellants Franz Suhadolnik and Betty Suhadolnik

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appeals against the above-named Defendants/Respondents Scott H. Pressman, M.D., Scott H. Pressman, M.D., a Limited Liability Company, and The Eye Associates, P.A., an Idaho Corporation, to the Idaho Supreme Court from the Order dated February 18, 2010, granting Defendants' summary judgment motion and dismissing the matter with prejudice.

2. Plaintiffs have the right to appeal to the Idaho Supreme Court, and the Order described above is appealable pursuant to Idaho Appellate Rules, Rule 11(a)(1).

3. A preliminary statement of the intended issues on appeal includes, but is not limited to, the following which shall not prevent the Appellants from asserting other issues on appeal: Whether or not the District Court erred in granting summary judgment in favor of Defendants as set forth in its Order.

4. No Order has been entered sealing any portion of the record in this case.

5. Plaintiffs/Appellants request a Reporter's Transcript of oral arguments before the District Court to specifically include:

a) Oral arguments heard on January 12, 2010, regarding Defendants' Motion for Summary Judgment.

6. Pursuant to Rule 28 of the Idaho Appellate Rules, Plaintiffs/Appellants request a Clerk's Record consisting of the Standard Record with the addition of:

- a) Defendants' Motion for Summary Judgment dated 11-13-09;
- b) Memorandum in Support of Motion for Summary Judgment dated 11-13-09;
- c) Affidavit of Scott H. Pressman, M.D., dated 11-9-09;
- d) Affidavit of Counsel in Support of Motion for Summary Judgment dated 11-13-09 with all attachments.
- e) Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment dated 12-29-09;

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- f) Affidavit of Counsel in Support of Memorandum in Opposition to Defendants' Motion for Summary Judgment dated 12-29-09 with all attachments;
- g) Plaintiffs' Disclosure of Expert Witnesses dated 12-14-09 with all attachments;
- h) Affidavit of John D. Hofbauer, M.D., dated 12-21-09;
- i) Plaintiffs' Supplemental Disclosure of Expert Witnesses dated 12-22-09 with all attachments;
- j) Reply Memorandum in Support of Defendants' Motion for Summary Judgment dated 1-5-10; and
- k) Memorandum Decision and Order.

7. I hereby certify the following:

- a) That a copy of this Notice of Appeal has been served on the Reporter.
- b) That the Clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript.
- c) That the Clerk of the District Court has been paid the estimated fee for preparation of the Clerk's record.
- d) That the appellate filing fee has been paid.
- e) That service has been made upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

RESPECTFULLY SUBMITTED this 19th day of March, 2010.

PEDERSEN and WHITEHEAD



Jarom A. Whitehead, ISB #6656
Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

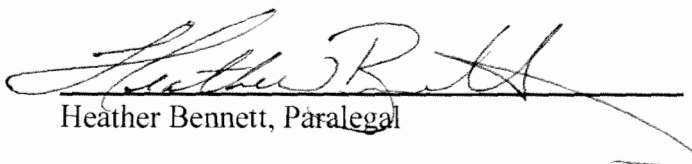
Heather Bennett, a paralegal with the firm Pedersen and Whitehead, hereby certifies that on the 19th day of March, 2010, she caused a true and correct copy of the within and foregoing NOTICE OF APPEAL to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

Terrence S. Jones
CAREY PERKINS
P. O. Box 519
Boise, ID 83701

<input checked="" type="checkbox"/>	First Class Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Express Mail

Kasey Redlich, Court Reporter
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

<input checked="" type="checkbox"/>	First Class Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Express Mail


Heather Bennett, Paralegal

NO. _____
AM. 8:00 FILED PM. _____

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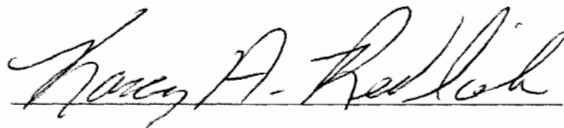
J. DAVID NAVARRO, Clerk
By BRADLEY J. THIES
DEPUTY

TO: CLERK OF THE COURT
IDAHO SUPREME COURT
451 WEST STATE STREET
BOISE, IDAHO 83702

FRANZ SUHADOLNIK,)	
)	
Plaintiff/Appellant,)	Supreme Court
)	Docket No. 37526-2010
)	
vs.)	
)	
)	Case No. CVPI-0808249
SCOTT H. PRESSMAN, M.D.,)	
)	NOTICE OF TRANSCRIPT
)	LODGING
Defendant/Respondent.)	

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on April 20th, 2010, I lodged a transcript(s) of 33 pages in length, of the **Summary Judgment Hearing(s)** dated **January 12, 2010**, for the above-referenced appeal with the District Court Clerk of the County of Ada in the Fourth Judicial District.



Kasey A. Redlich,
Certified Court Reporter

4-20-10

Date

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as husband
and wife,

Plaintiffs-Appellants,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
PRESSMAN, M.D., a limited liability
company, THE EYE ASSOCIATES, P.A., an
Idaho corporation, and BUSINESS ENTITIES
I through X, and JOHN DOE and JANE DOE,
husband and wife, I through X,

Defendants-Respondents.

Supreme Court Case No. 37526

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the
State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 5th day of May, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF EXHIBITS

00204

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as husband
and wife,

Plaintiffs-Appellants,

vs.

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PRESSMAN, M.D., a limited liability
company, THE EYE ASSOCIATES, P.A., an
Idaho corporation, and BUSINESS ENTITIES
I through X, and JOHN DOE and JANE DOE,
husband and wife, I through X,

Defendants-Respondents.

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CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

JAROM A. WHITEHEAD
ATTORNEY FOR APPELLANTS
TWIN FALLS, IDAHO

TERRENCE S. JONES
ATTORNEY FOR RESPONDENTS
BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: MAY 12 2010

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF SERVICE

00205

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANZ SUHADOLNIK and BETTY
SUHADOLNIK, individually and as husband
and wife,

Plaintiffs-Appellants,

vs.

SCOTT H. PRESSMAN, M.D., SCOTT H.
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Idaho corporation, and BUSINESS ENTITIES
I through X, and JOHN DOE and JANE DOE,
husband and wife, I through X,

Defendants-Respondents.

Supreme Court Case No. 37526

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 22nd day of March, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE TO RECORD

00206